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1955

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and on Appeal therefrom in the

Court of Appeal

and Decisions in the

Ecclesiastical Courts

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ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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DETERMINED BY THE

PROBATE DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

LE ROY-LEWIS *v.* LE ROY-LEWIS.

1954
July 2.

Barnard J.

Husband and Wife—Maintenance—High Court—Quantum—Increase in husband's means after desertion—Wife's earning powers not to be taken into account—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23.

A husband who deserted his wife in 1952 had been allowing her since the marriage in 1947, when she gave up her employment as a shop assistant, £5 a week housekeeping money (out of which she paid rent of 30s. to her mother), and had provided her with other benefits. In addition to some £5 10s. a week which he received at the time of these proceedings from his employment, the husband was in receipt of an income from a trust settlement which had steadily increased from some £480 net in 1949–50 to some £915 net in 1953–54. After deserting his wife, the husband reduced her allowance to £3 a week. On an application for periodical payments on the ground that the husband had wilfully neglected to provide reasonable maintenance for the wife:—

Held, (1) that it was reasonable to expect that had the parties continued to live together the wife would have received some benefit from the increase in the husband's means; that, although she was young and had no children, there was no reason why she, the innocent party, should go back to her former employment as a shop assistant in order to reduce by reason of her own income the husband's liability to maintain her;

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(2) that, having regard to the fact that the payments under the settlement were net payments, and to the other circumstances of the case, the husband should be ordered to pay the wife such sum as would after deduction of tax amount to £6 a week.

Observations of Hodson J. in *Scott* v. *Scott* [1951] P. 245, 248; [1951] 1 All E.R. 216 considered.

ORIGINATING SUMMONS under section 23 of the Matrimonial Causes Act, 1950.

The parties were married in July, 1947, and there were no children of the marriage. The husband was a man of independent means and the wife at the time of the marriage had been working as a shop assistant. After the marriage the parties lived with the wife's mother at Woburn Sands, Bletchley. The husband allowed the wife £5 a week for housekeeping, out of which she paid her mother 30s. a week for rent. The £5 a week was not the only financial benefit she received from her husband while they were living together. On June 21, 1952, the husband left his wife in circumstances which were held to amount to desertion.

After the marriage the husband received a capital sum of over £12,000, which had, however, been expended. He was in receipt of an income from a trust settlement which was just over £480 in the year ending April 5, 1950, and which had increased to £915 during the year ending April 5, 1954. During the year in which the husband had left the wife he had received some £660. The income from the trust settlement was a net income. The husband was also in receipt at the time of these proceedings of an income from employment as a hand in a nursery of some £5 10s. a week. It was estimated that after recovering a certain amount of tax by way of personal allowances, his spendable income from the settlement during the last year was just over £1,000.

The husband reduced the wife's allowance to £3 a week when he deserted her, and continued to pay that sum until the wife took out the present summons.

T. M. Eastham for the wife.

G. D. Lovegrove for the husband. As the wife is young and capable of earning an income on her own the court should have regard to this factor in assessing such amount as the husband may be ordered to pay.

BARNARD J. stated the facts and continued: The first matter which I have to decide is whether the husband has been guilty of wilful neglect to provide the wife with reasonable maintenance.

A safe guide is given by Hodson J. in *Scott* v. *Scott*.[1] In the course of his judgment he said[2]: "As I understand it, the "question of what is reasonable maintenance for the wife and "children has to be considered, with reference to the husband's "common law liability to maintain his wife and children, and "the word 'reasonable' no doubt has to be interpreted against "the background of the standard of life which he previously had "maintained."

While I think that that passage is a good guide, it is certainly not an exhaustive guide, because whatever the previous standard of life may have been, I must take into account, if, as in the present case, it is the fact that the husband's means have very much increased, that if the husband had not deserted his wife, as he did, she would have received some benefit at any rate from his increased means. The wife should not be deprived of this now when I ought to put her in the position in which she would have been but for the husband's wrongdoing in deserting her.

I have no doubt on the facts put before me that the £3 a week which he has been allowing his wife is not reasonable maintenance for her. It has been suggested that because she was working before the marriage and is still young, and as there are no children of the marriage, she ought at once to go back into the position she was in before the marriage and start earning her living, with as far as I can see only one object, to reduce the amount of money which the husband should pay to her, his wife. I do not accept that view. She may have been lucky, or, at any rate thought that she was lucky at the time, in marrying someone who brought about an improvement in her financial and possibly her social position; but it has been through no fault of hers that their married life together has come to an end, and I see no reason whatever why the wife should go back to earning in order to reduce the husband's liability to maintain her. It only remains for me to fix what I think is reasonable maintenance on the figures put before me, taking into consideration, of course, the conduct of the parties.

[His Lordship referred to the increase in the net income from the trust settlement and continued:] I feel that on the figures put before me, the husband receiving all his income net, I shall have to make an order for a net figure. I do not like doing this because it is contrary to the usual practice of the court and may possibly work some injustice if there were any extreme alterations

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[1] [1951] P. 245.

[2] Ibid. 248.

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in the rate of tax; but I do not feel that I can do anything else. I have come to the conclusion that as the husband has £25 a week net from the trust settlement and from what he earns, which is purely spendable income, I shall not be doing any hardship if I order him to pay the wife such sum as after deduction of income tax at the current rate will amount to £6 a week, and that is the order that I propose to make.

Order accordingly.

Solicitors: *C. Butcher & Simon Burns; Burton Yeates & Hart for Malcolm, Wilson & Cobby, Worthing.*

J. B. G.

C. A.

1954 *Oct.* 28.

Lord Goddard C.J., Hodson L.J. and Vaisey J.

PALMER *v.* PALMER.

Husband and Wife—Divorce—Cruelty—Insanity—M'Naghten rules—Applicability as defence to cruelty.

Per curiam. When, in proceedings for divorce on the ground of cruelty the respondent alleges that he was insane at the time when the acts complained of were committed, both limbs of the M'Naghten rules with regard to insanity apply in the same way as in a criminal case and consequently, unless the respondent can establish either that he did not know the nature or quality of the acts committed or that if he did know their nature and quality he did not know that they were wrong, a plea of insanity will not afford an answer to the charge of cruelty.

Dictum of Hodson L.J. in *Swan* v. *Swan* [1953] P. 258, 268; [1953] 2 All E.R. 854 applied.

Appeal from Mr. Commissioner Grazebrook dismissing a wife's petition for divorce on the ground of cruelty.

The facts, which are more fully stated in the judgment of Lord Goddard C.J., were briefly as follows: The marriage, which took place in April, 1938, was for some time a complete success, but about the year 1946 the husband began to show signs of mental disability, and between that date and 1952 on two occasions he went into a mental home as a voluntary patient and later discharged himself. In 1952 the husband was finally certified as insane and had not left the mental hospital since. During the time when he was living at home, both before going to the mental hospital and after he came out, the husband had assaulted his wife on a number of occasions, the nature of the assaults being such as would entitle the petitioner to a divorce on the ground of cruelty. In his answer to the petition the husband set up the defence of insanity, alleging that at the time of the commission of the assaults he was not aware of the nature or quality of the acts alleged against him and/or did not know that the acts were wrong.

The commissioner dismissed the petition and in the course of his judgment said that he was satisfied that the husband did not realize what he was doing when he committed the acts of violence against his wife and, further, that when he committed the acts, he did not think that they were wrong.

The petitioner appealed.

Roy Beldam for the wife. The commissioner was wrong in dismissing the wife's petition. He applied the M'Naghten rules, as laid down for application in criminal cases when insanity is set up as a defence, and found not only that the respondent did not know the nature and quality of the acts which he was committing but also that, if he did know what he was doing, he did not know that the acts were wrong. Those findings, if the M'Naghten rules apply in a case of divorce on the ground of cruelty, would afford a defence under either of the first two limbs of the rules. It is submitted, however, that the finding of the commissioner on both heads of the rules was not open to him on the medical evidence which had been called before him, and insanity which falls short of the standard laid down in the M'Naghten rules is no defence to a charge of cruelty: see *White* v. *White*.[1] It is still in doubt whether both limbs of the rules apply. In *Swan* v. *Swan* [2] Hodson L.J. expressed the view that both limbs applied, but that was obiter since the question did not arise for decision in that case, and it is submitted that it is still open to argument.

[LORD GODDARD C.J. The court is in favour of the contention of the appellant with regard to the facts on which the commissioner based his finding that the respondent was insane.]

Stuart Horner for the husband. If, as that intimation suggests, the respondent had no defence on the facts under either limb of the M'Naghten rules, it is not contended that cruelty was not established.

LORD GODDARD C.J. This is an appeal from Mr. Commissioner Grazebrook, who dismissed the wife's petition for divorce based on cruelty. The ground of his decision was that he found that the husband was insane, and considered that, on the evidence, the husband did not know what he was doing and, therefore, applying the M'Naghten rules,[1] he came to the conclusion that he was bound to reject the petition.

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[1] [1950] P. 39.

[2] [1953] P. 258, 268; [1953] 2 All E.R. 854.

The question of the application of the M'Naghten rules was much discussed in *Swan* v. *Swan*.[2] Those rules, so often quoted, especially in murder cases, lay down that, in law, an act can be excused on the ground of insanity if the person charged did not know the nature or quality of the act, or if he did, that he did not know that the act was wrong.

As a simple illustration of a man knowing the nature and quality of the act, but not knowing that it was wrong, I remember a case on circuit many years ago where a man took a knife to his wife, but it was proved that he was a man who was devotedly attached to her and believed that in using the knife upon her he was performing a surgical operation, which he thought was necessary to relieve a condition from which he believed she was suffering. Of course, the man was insane, because although he knew the nature and quality of the act, he obviously did not know that it was wrong, since he thought that, in putting the knife into his wife, he was doing a kindly and beneficial act. It might be said that in that case he did not know the quality of the act, but, if I remember aright, the case turned largely on the fact that he believed that he was doing a service to his wife.

The present case is, no doubt, one in which one cannot help feeling sorry for the parties, because the wife was very fond of her husband and at first the marriage was a complete success, but, unhappily, in about the year 1946 the husband began to show signs of mental disability, and between that time and 1952, when he was finally certified (and he has not been out of the hospital since) on two occasions he went into a mental home as a voluntary patient and later discharged himself. During the time when he was at home, both before he went into the mental hospital as a voluntary patient and after he came out, he assaulted his wife on various occasions, and no one has suggested that these assaults were not sufficiently serious to justify the court, if it accepted the evidence, as no doubt the commissioner did, in granting the wife relief.

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[1] (1843) 10 Cl. & F. 200.

[2] [1953] P. 258; [1953] 2 All E.R. 854.

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Apart from the evidence of the wife, there was the evidence of the relieving officer who saw the husband. A relieving officer does not profess to be a medical man, but it is his duty, if he hears that a person's mental condition is doubtful, to see that person, because it may be that he must apply either for an ordinary certification, or even, in certain cases, for an emergency certification. The conversations which the relieving officer had with the husband show clearly that the husband recognized that he had from time to time ill-treated his wife. He struck her blows because he believed that she had been guilty of unfaithfulness to him, which she had not. The fact that he had these hallucinations shows that he is a person of unsound mind; but the law does not in criminal cases—and I can see no reason to distinguish between criminal and divorce cases for this purpose—merely consider whether the man has got some defect of reason; the defect of reason must be such as to affect his responsibility. It is often said that the difference between lawyers and doctors, in these cases, is that the doctor looks only at the mental condition of a man and the lawyer looks at the way in which that condition affects the man's responsibility to the law.

I entirely agree with Hodson L.J. in *Swan* v. *Swan*,[3] when, although it was not necessary finally to decide the point, he said that he thought that both limbs of the M'Naghten rules applied when considering whether or not a man who was insane was cruel to his wife. If a man knows the nature and quality of the act, and knows that it is wrong, he is responsible.

I think that it is not always remembered, at any rate, perhaps by people who are not lawyers, that a case which turns on hallucinations and delusions is no different from the case of a man who may be perfectly sane and not the subject of delusions, but is acting under a mistake and, it may be, a genuine mistake. For instance, to take the common case of a soldier returning from a war. One has had the unhappy experience at assizes of cases in which a man has been told complete lies about his wife. He has come home under the belief that his wife has been unfaithful to him and has killed her, and then it turned out that the wife had not been unfaithful at all and that there was really no reason to suppose that she had. In such a case the man has not a disease of the mind, but has been misled by slanderous rumours, or something of that kind. No one doubted that the man honestly believed what he had been told, but he knew perfectly

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[3] [1953] P. 258.

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well that that did not justify him in killing his wife. If he had been suffering under an insane delusion produced by a disease of the mind, which made him think, although he had never been told, that his wife had been unfaithful to him, but still knew quite well that it was wrong to kill his wife, it would be no excuse to say that he had an insane delusion that his wife was unfaithful. Suppose she was unfaithful, he would know perfectly well that he was not entitled, for that reason, to kill her.

When the husband was before the magistrates, on an occasion when his wife successfully took proceedings against him on the ground of persistent cruelty, he admitted that he knew perfectly well that he had been assaulting his wife, and he said that he was doing so because he hoped it might bring her back to him, or because she wanted him to go to Knowle Mental Hospital to be treated again and he did not want to go. So he proceeded to slap her. He did not pretend that he did not know that it was wrong for him to slap her. He knew that he was committing an assault on his wife.

The doctor who was called from the Knowle Hospital and knew the husband when he was first there as a voluntary patient said that he was a progressive case. He was asked: "Would "the man know that those acts"—the assaults on his wife—"were wrong?" and he said "No." Then he went on to give the reason. "He [the husband] is basing his conduct not upon "sensible things, but upon delusions. . . ." Being a doctor, he took the view that the question was whether the man was suffering from a delusion, but a lawyer would have taken the view that the question was whether that delusion affected his responsibility. The doctor went on: ". . . and he might very "well think he was doing the correct thing by correcting her." What does that mean? A husband might very well think, sometimes quite correctly, that if his wife had done something very wrong or stupid, a good slap might make her sensible again, but I do not suppose that a single slap would be enough to justify the wife obtaining a decree on the ground of cruelty.

Here it is not a case of a single slap, but of several assaults upon the wife. Therefore, this man could not and did not pretend that he was entitled to assault his wife in the way he did. In the first place, the wife was trying to get him to go back to the home. He knew that perfectly well. He did not want to go back, and he thought that he would give her a lesson to teach her not to get him to go back. I think that the position in the present case is really in no way different from that in

Swan v. *Swan*.[3] Although that case was decided on a different ground, so far as there was any question whether both limbs of the M'Naghten rules applied, I should, for my part, say that I entirely agree with Hodson L.J.'s opinion in that case that both limbs apply. I see no good reason for saying that when one is dealing with insanity and the inflicting of personal injury or assaults upon another, there should be any difference between the rule applied by the Divorce Division and in the criminal courts. Before the assaults, or any form of personal injury which is inflicted upon a wife or by a wife upon a husband can be excused, if I may use that expression, on the ground of insanity, both limbs of the M'Naghten rules must be applied.

For those reasons, although I appreciate the care which the commissioner took in his review of the cases, in my opinion, this appeal ought to succeed and the wife should be granted a divorce, because I do not think that the husband can be excused on the ground of insanity for the injuries which he inflicted upon his wife.

Hodson L.J. I agree. The commissioner, in a very careful judgment, came to the conclusion that the wife had proved her case on cruelty. He used this language: "The matters "detailed by the wife—and she gave her evidence very well "and very fairly, and they are in fact to some extent supported "by her sister—would be sufficient to constitute cruelty in an "ordinary case." Then he went on to say that this was not an ordinary case, because the question which the court had to consider was whether there could be cruelty having regard to the state of the husband's mind.

Unfortunately, I think that the commissioner made a slip in his conclusion, because he said: ". . . I am satisfied that the "husband did not realize what he was doing when he committed "these acts of violence against his wife, and further, that "when he committed these acts he did not think they were "wrong . . ."; but the evidence never went to the length of establishing that the husband did not realize what he was doing when he committed the acts of violence against the wife, and it was never contended on behalf of the official solicitor that that was so.

The real point in this case is whether, when he committed the acts, he (the husband) did not know that they were wrong. That contention, which succeeded before the commissioner, has been supported here, and it is based, I think, entirely on the evidence of a very experienced medical man, who is the medical superintendent at the Knowle Hospital, where the husband has been for many years. He was obviously familiar with the M'Naghten rules, and having been asked the question: "Would "he know that those acts were wrong," he answered: "No." Upon that, Mr. Horner was fully entitled to argue that there was evidence before the court which would justify the court in saying that the second branch of the M'Naghten rules applied and, therefore, the husband had a good defence.

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[3] [1953] P. 258.

The doctor, in answering "No," gave his reason for making that answer. The Lord Chief Justice has already read the answer, which indicates that the doctor was basing himself on the motive for the man acting in the way in which he did, which was provided by the delusion from which he suffered. The doctor reasoned from that, that the husband did not know that the act was wrong. With all respect to the doctor, I think that that reasoning is unsound. One must, as Mr. Beldam put it, look at the matter as if the wife had indeed been unfaithful, as the deluded man thought she had, but the fact that that was the motive does not mean that he did not know that what he was doing was wrong. In fact, the contrary appears from the evidence, because, as was pointed out in the cross-examination of the doctor, the relieving officer had seen him in January of the same year, 1952, the year he was certified, and he then expressed regret for the assaults which he had committed upon his wife, which is, surely, the strongest possible evidence that he knew that what he was doing was wrong. In that state of the evidence, which was fairly recognized by the doctor in cross-examination when Mr. Beldam put it to him, I think that it is quite impossible to come to the conclusion that this case is covered by either branch of the M'Naghten rules. Accordingly, the man being responsible for his acts, and the cruelty being established against him, the wife is entitled to a decree. Therefore, the appeal should be allowed.

VAISEY J. For the reasons given by my Lords, I agree that this appeal succeeds.

Appeal allowed.

Solicitors: *Philip Mills & Co., Guildford; Official Solicitor.*

P. B. D.

SWYMER v. SWYMER (BY HIS GUARDIAN AD LITEM).

C. A.

1954
Nov. 2,
3, 12.

Lord Goddard C.J.,
Hodson and
Romer L.JJ.

Husband and Wife — Divorce — Insanity — Care and treatment—Continuous—Voluntary patient—Absence from mental hospital for cure of fractured leg — Mental Treatment Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 23), *ss.* 1 (1) (5), 2 (3), 3 (1)—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*), (2) (*d*).

A husband was admitted to a mental hospital pursuant to a reception order in 1925. In 1951 he was discharged "relieved," and immediately readmitted as a voluntary patient under the Mental Treatment Act, 1930. He was incurably of unsound mind. In 1953, he was sent for treatment for a fractured leg to another hospital which was not an approved place within the Act of 1930, and remained there from January to May, returning to the mental hospital when the leg had healed. His name remained on the books of the mental hospital during his absence and regular reports were made on him to the superintendent of the mental hospital. On his wife's petition for divorce on the ground that he had been continuously under care and treatment for five years before the presentation of her petition:—

Held, that the five-year period of continuous care and treatment required by the Matrimonial Causes Act, 1950, s. 1, had not been broken by the temporary absence of the voluntary patient from a place approved under the Mental Treatment Act, 1930.

Parliament, by the Third Schedule to that Act, had envisaged the making of rules providing for temporary absences for voluntary patients, and must be taken to have known, when enacting the Matrimonial Causes Act, 1950, that mental treatment involved temporary absences; the word "continuously" should thus be construed, not strictly, but only in conformity with its subject-matter, namely, mental treatment involving such temporary absences.

Safford v. *Safford* [1944] P. 61; 60 T.L.R. 439; [1944] 1 All E.R. 704 considered.

Status of voluntary patients under the Mental Treatment Act, 1930, considered.

Decision of Mr. Commissioner Grazebrook [1954] 1 W.L.R. 1329; [1954] 3 All E.R. 114 reversed.

APPEAL from Mr. Commissioner Grazebrook Q.C.[1]

The facts, as stated by Lord Goddard C.J., were as follows: The parties were married in 1918, and in November, 1925, the husband became subject to a reception order and was admitted to a mental hospital at Bexley. He remained subject to that order until December 27, 1951. During that time he had had certain periods of leave, and during 1951 was for a week on a holiday in charge of the Mental After-Care Association, which was regarded as part of his treatment. On December 27, 1951, he was discharged as "relieved," and thereupon the reception order ceased to have effect; but on the same day he was admitted into the same hospital as a voluntary patient under the provisions of the Mental Treatment Act, 1930. In January, 1953, he had an accident and broke his leg; and, as there were not suitable facilities for treating this condition at Bexley, the medical superintendent sent him for treatment to a neighbouring establishment, the Southern Hospital, Dartford, where he stayed till May 11, 1953, when he returned to the Bexley Hospital, and had ever since remained there. The Bexley Hospital was, but the Southern Hospital was not, an approved place for the purposes of the Mental Treatment Act, 1930.[2] During the short interval that he was in the Southern Hospital he remained on the books of the Bexley Hospital, and arrangements were made, and were carried out, for his progress and in particular any change in his mental condition to be reported to the superintendent of the mental hospital.

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[1] [1954] 1 W.L.R. 1329; [1954] 3 All E.R. 114.

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[2] Mental Treatment Act, 1930, s. 1: "(1) Any person who is desirous "of voluntarily submitting himself "to treatment for mental illness, and "who makes a written application "for the purpose to the person in "charge, may without a reception "order be received as a voluntary "patient in an institution within the "meaning of this Act, or in any "hospital, nursing home or place "approved for the purposes of this "section by the Board of Control, or "into the charge as a single patient "of a person so approved, and any "approval under this section may be "granted subject to such conditions "as the Board may think proper and "may be revoked at any time. . . . "(5) Any person received as a voluntary patient under this section may "leave the institution, hospital, home "or place upon giving to the person "in charge seventy-two hours' notice "in writing of his intention to do "so, . . ."

S. 2: "(3) If any person received "as aforesaid becomes at any time "incapable of expressing himself as "willing or unwilling to continue to "receive treatment, he shall not "thereafter be retained as a voluntary patient for a longer period "than twenty-eight days, and shall, "if he has not been previously discharged, be discharged on the "expiration of twenty-eight days "from the date on which he became "incapable of so expressing himself, "unless in the meantime he has "again become capable of so expressing himself, or steps have been "taken to deal with him either under "the principal Act as a person of unsound mind or under section five "of this Act as a person who is "likely to benefit by temporary "treatment."

S. 3: "(1) Any commissioner may "at any time visit a person received "as a voluntary patient under section "one of this Act or under the provisions of any local Act, and report "to the Board of Control on the "case."

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On October 21, 1953, the wife presented a petition for divorce on the ground that her husband was incurably of unsound mind, and she relied on section 1 (1) (*d*) of the Matrimonial Causes Act, 1950.[3] The commissioner was satisfied as to the insanity, but held, on July 30, 1954, that although the husband's name had remained on the books of the mental hospital to which regular reports were made, the period of at least five years' continuous care and treatment required by the statute had been broken while the fractured leg was being cured in the Southern Hospital, and the petition must accordingly be dismissed. In view of his decision in law, the commissioner did not consider a discretion statement put in by the wife.

The wife appealed.

Dimitry Tolstoy for the wife. The question is whether the husband was receiving treatment under the Mental Treatment Act, 1930, during the four months when he was in the Southern Hospital, which, it is conceded, is not an institution within the definition section 21 (1) of the Act of 1930. A person "while " . . . receiving treatment as a voluntary patient" under section 1 (2) (*d*) of the Matrimonial Causes Act, 1950, is a person who has a status—the status of a voluntary patient. The principle to be applied is the same as that in *Safford* v. *Safford*,[4] where Lord Greene M.R. said that detention of a person "in pursuance of "any order for detention and treatment" under section 3 (*a*) of the Matrimonial Causes Act, 1937 (the same words as those in section 1 (2) (*c*) of the Act of 1950), was a status and not merely a physical fact.[5] And in *Safford's* case [6] the Court of Appeal held that the statutory period of continuity was not broken by a period of absence "on trial" of a person detained under an order, and disapproved of the decision of Sir Boyd Merriman P. in *Shipman* v. *Shipman* [7] that absences of more than two or three days were interruptions of the statutory period. In *Shipman's* case [7] the President said that there was no "detention" of a voluntary patient under the Act of 1930 [8]; but in *Bithell* v. *Bithell* [9] Lord Merriman P. referred to the "status" of being a voluntary patient.[10]

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[3] Matrimonial Causes Act, 1950, s. 1: "(1) Subject to the provisions "of the next following section, a "petition for divorce may be pre"sented to the court either by the "husband or the wife on the ground "that the respondent . . . (*d*) is in"curably of unsound mind and has "been continuously under care and "treatment for a period of at least "five years immediately preceding "the presentation of the petition; . . . "(2) For the purposes of this section "a person of unsound mind shall be "deemed to be under care and treat"ment—(*a*) while he is detained in "pursuance of any order or inquisi"tion under the Lunacy and Mental "Treatment Acts, 1890 to 1930, or "of any order or warrant under the "Army Act, the Air Force Act, the "Naval Discipline Act, the Naval "Enlistment Act, 1884, or the Yar"mouth Naval Hospital Act, 1931, or "is being detained as a Broadmoor "patient or in pursuance of an order "made under the Criminal Lunatics "Act, 1884; . . . (*c*) while he is "detained in pursuance of any order "for his detention or treatment as a "person of unsound mind or a person "suffering from mental illness made "under any law for the time being "in force in Northern Ireland, the "Isle of Man or any of the Channel "Islands (including any such law "relating to criminal lunatics); "(*d*) while he is receiving treatment "as a voluntary patient under the "Mental Treatment Act, 1930, or "under any such law as is men"tioned in paragraph (*c*) of this sub"section, being treatment which "follows without any interval a "period during which he was "detained as mentioned in para"graph (*a*), paragraph (*b*) or para"graph (*c*) of this subsection; and "not otherwise."

It is further submitted that the status of voluntary patient can only be brought to an end by one of the three methods specified in the Act of 1930: under section 1 (5), section 2 (3), or section 3 (2); moreover, the status continues whether or not a temporary absence of such a patient is lawful. In *Wyatt* v. *Wyatt* [11] Karminski J. accepted the argument that the discharge of a patient under the Act of 1930 and the rules made thereunder was a nullity unless it complied with the Act and the rules. By analogy the discharge of a voluntary patient must similarly be in compliance with the Act of 1930.

[LORD GODDARD C.J. If a person is received into a licensed institution as a voluntary patient, but walks out without giving 72 hours' notice, would he continue to be a voluntary patient? There must be some power to look after him, for doors are locked behind him, and that would be false imprisonment if he can walk out whenever he likes.]

It is submitted that he must give notice, though the Act of 1930 provides only that he is to be "received," in contrast to the Lunacy Act, 1890, s. 11 (1), which provides that a person under an order is to be "received and detained."

[LORD GODDARD C.J. The question here is treatment, not detention?]

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[4] [1944] P. 61; 60 T.L.R. 439; [1944] 1 All E.R. 704.

[5] [1944] P. 61, 66.

[6] [1944] P. 61.

[7] [1939] P. 147; 55 T.L.R. 273; [1938] 4 All E.R. 732.

[8] [1939] P. 147, 166.

[9] [1954] 3 W.L.R. 463; [1954] 3 All E.R. 171.

[10] [1954] 3 W.L.R. 463, 466.

[11] [1954] P. 26, 29; [1953] 1 All E.R. 1185.

Yes, and it is immaterial to the present case whether or not there is power to keep a voluntary patient physically by force, for there is nothing in the Act which prevents a medical superintendent exercising his discretion and allowing such a patient to leave temporarily. Parliament has fettered the medical superintendent's powers in regard to a person detained under an order by setting out in the Lunacy Act, 1890, the particular circumstances in which this could be permitted. But by inference there is no such fetter on the superintendent's discretion in relation to a voluntary patient, for though by the Third Schedule to the Mental Treatment Act, 1930, the board of control was given power to make rules providing for temporary absences, no such rules have been made applicable to voluntary patients.

In any event, the " treatment " of the husband here did not come to an end when he went to the Southern Hospital, for he remained on the books of the mental hospital and reports were made to the superintendent on his mental condition. The superintendent did not delegate his powers of treatment of a voluntary patient. In *Green* v. *Green* [12] Sir Boyd Merriman P. said that absence " on trial " would break the statutory period unless the person was in the care of agents for the mental home authority; but that case cannot assist in the present, for in *Safford's* case [13] Lord Greene M.R. said that the superintendent could not delegate his powers. Here the treatment was not interrupted because the status of voluntary patient never came to an end in accordance with the statutory provisions, and therefore the husband has been " continuously under care and treatment " for the necessary statutory period.

B. Stuart Horner for the Official Receiver as guardian ad litem to the husband. In the Matrimonial Causes Act, 1950, the words of section 1 (2) (*d*) are " while he is receiving treatment as a " voluntary patient under the Mental Treatment Act, 1930." Bexley Hospital was a hospital within the meaning of the Act of 1930; but as the husband was not in Bexley Hospital while receiving treatment for his broken leg he was not within section 1 of the Act of 1930 and so not receiving treatment for the purposes of the Matrimonial Causes Act, 1950. The Southern Hospital was not a place approved by the Minister of Health for the purposes of the Mental Treatment Act. As he was not in a place prescribed by the Minister and there is no power of recapture in relation to a voluntary patient, the continuity of the five-year statutory period was broken during his four-month period at the Southern Hospital.

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[12] [1939] P. 309, 312–3; 55 T.L.R. 839; [1939] 3 All E.R. 389.

[13] [1944] P. 61, 69.

Cur. adv. vult.

November 12. LORD GODDARD C.J. There is no doubt that the husband is insane and that his insanity is incurable: the only question raised by the appeal is whether he has been continuously under care and treatment for at least five years immediately preceding the presentation of the petition as defined by section 1 (2) (*d*) of the Matrimonial Causes Act, 1950. The commissioner found there had been a break in the necessary period, and dismissed the petition.

[His Lordship stated the facts and continued:] By section 1 (2) (*d*) of the Act of 1950 a person of unsound mind is deemed to be under care and treatment while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, and we have, therefore, to consider the provisions of that Act to see whether the fact that the husband was sent to be treated for his broken leg to a general hospital which was not an approved place under the Act causes a breach in the care and treatment so that the period of five years' continuous treatment is broken.

A person who wishes voluntarily to submit to treatment for mental illness and who applies in writing for that purpose to the person in charge may be received without a reception order as a voluntary patient in an approved hospital; see section 1 (1) of the Act of 1930. As soon as he is received he becomes properly described as a voluntary patient. By subsection (5) of the same section it is provided that he may leave the institution on giving 72 hours' notice of his intention so to do. Notice of his reception has to be given to the board of control (section 2 (1)) and, by subsection (2), notice of his death or departure has to be given to the board before two days have elapsed. Apparently, therefore, this notice has to be given whether the patient has left the institution pursuant to his giving 72 hours' notice or whether he has taken himself off without notice.

By section 2 (3), if he becomes incapable of expressing himself as willing or unwilling to remain he must not be retained as a voluntary patient for more than 28 days. I need not set out the whole provisions of this lengthy subsection, but it is obvious that it is meant to apply to the case of a voluntary patient who deteriorates mentally while in an institution. He must not be kept indefinitely on a voluntary basis, but, if not discharged, must be certified as insane, or as a person fit for temporary treatment under section 5. Temporary patients are not received on their own application but on that of their relatives or local health officials; the section seems designed for persons who are regarded as merely temporarily insane and likely to recover in a short time and who, therefore, need not be the subject of formal certification and a reception order.

The only other section to which I need refer is section 3. Subsection (1) provides for the visitation of voluntary patients and reports on them to the board of control. Subsection (2) enables the board to order their discharge or to have them certified or dealt with under section 5. No doubt that subsection appears to contemplate that the action of the board will follow on a commissioner's visit and report, but it seems to me that the board also has power under this subsection to deal with a person to whom section 2 (3) applies.

I do not propose to decide in this case, for it is unnecessary, what are the precise rights and obligations of a voluntary patient so far as submitting to detention or restraint are concerned. There is no doubt that he can discharge himself from an institution and get rid of the description applied to him by giving 72 hours' notice, and I have no doubt that this interval is prescribed so that if the medical superintendent should consider he ought to be restrained for his own or the public safety he can take steps either under section 5 or under the principal Act (the Lunacy Act, 1890). But it is, I think, clear that, once he has applied for reception and has been received as a voluntary patient, he so remains until one or other of the steps provided by the Act are taken, that is, voluntary discharge under section 1 (5), or action under section 2 (3), or under section 3 (2). He is invested with the same kind of quasi status as was mentioned by Lord Greene M.R. in *Safford* v. *Safford*,[1] where he was considering the case of an insane person.

Accordingly, in my opinion, the husband has always been a voluntary patient since his reception as such in December, 1951, and he was still a voluntary patient when he was taken to the Southern Hospital.

The question then remains whether he was then receiving treatment as such. In my opinion he was. He was still on the books of the Bexley Hospital; reports on him were required by and were sent to the superintendent, who, therefore, had not in any way abandoned him or his treatment; and I see no reason to suppose that, had he considered that some particular action ought to be taken regarding the patient on account of his mental state, he would not have requested the Southern Hospital to take it. I find nothing in the Act of 1930 to require that all treatment must be given within the curtilage of the approved institution. Otherwise, if a voluntary patient were to go out for a walk or take any form of necessary and beneficial exercise outside the curtilage of the institution it would follow that the period of care and treatment was ended, which would indeed be an absurd result. A patient certified under the principal Act can be granted leave or sent on a holiday as part of his treatment, as indeed was done in this very case. In my opinion the temporary absence of a voluntary patient for the convenience of nursing him for a physical as distinct from a mental injury does not break the continuity of his treatment, though that may be given outside the walls or grounds of the institution to which it was always intended he should and did return. I would allow the appeal.

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[1] [1944] P. 61, 66: 60 T.L.R. 439; [1944] 1 All E.R. 704.

HODSON L.J. I agree. I have had the advantage of reading beforehand the judgment which Romer L.J. is about to deliver, and I agree with that also.

ROMER L.J. I am in full agreement with the judgment of Lord Goddard C.J. It seems to me that once a person has been received under section 1 of the Mental Treatment Act, 1930, into an approved hospital or other place, he becomes and remains a voluntary patient until one or other of the events mentioned in section 1 (5), section 2 (3) and section 3 (2) of the Act occurs. As none of these events has happened in relation to the husband since he was received by the Bexley Mental Hospital as a voluntary patient on December 27, 1951, it follows that he has at no time ceased to be a voluntary patient, and, indeed, he is still one now.

This, however, is not sufficient in itself to satisfy the relevant provision of section 1 of the Matrimonial Causes Act, 1950, which, as applied to the present case, requires that the husband respondent should have been continuously receiving care and treatment (including voluntary treatment) as a voluntary patient for a period of at least five years immediately preceding the presentation of the petition. Even if the word " continuously " in the section has to be construed strictly and literally, I am of opinion that no interruption in his treatment as a voluntary patient resulted from his four months' sojourn in the Southern Hospital in 1953. There is no evidence that he received any special treatment for his mental condition in the Bexley Hospital of which he was deprived on his transfer to the Southern Hospital, and it may well be that all he received was general care and supervision. The Bexley Hospital at no time disclaimed responsibility for the husband's welfare or regarded his absence as other than casual, for they kept him on their register the whole time he was away, and the medical superintendent made arrangements to be notified of his progress generally while at the Southern Hospital, and, in particular, if his mental condition altered or required attention.

Accordingly, there was, in my opinion, continuity even in the narrowest sense of that word, in the husband's treatment during the relevant period, and section 1 of the Act of 1950 is, therefore, satisfied.

It appears to me, however, that the word "continuously" in that section should not be construed with absolute strictness, but should be interpreted, as it legitimately can be, in such a sense as to conform to the subject-matter, namely, mental treatment, in connexion with which it is used. In *Safford* v. *Safford*,[2] this court held that absences for periods of less than four days under section 275 of the Lunacy Act, 1890, and absences for longer periods under section 55 of the Act, having regard to the circumstances which attended those absences, were not interruptions of the "detention" required by section 3 of the Matrimonial Causes Act, 1937. As Lord Greene M.R. recognized in his judgment in that case, the legislature must be taken to have known when the Act of 1937 was passed that some of the persons who are detained under the Lunacy Act, 1890, are permitted periods of absence from the institution or other place in which they are detained; and, in my opinion, Parliament must be taken to have had the like knowledge when the statute of 1950 was enacted, and to have known, moreover, that during these periods of absence such persons are, in many cases, not receiving actual "treatment" at all. The word "continuously" in section 1 of the Act of 1950 must therefore be read, in relation to persons who are detained, in a sense which does not exclude these periods of temporary absence from the concept of continuity which Parliament had in mind; for a strict interpretation would lead to

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[2] [1944] P. 61.

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imputing to the legislature a disregard of features which are incidental to the care and treatment to which the word is applied.

By the Third Schedule to the Mental Treatment Act, 1930, the board of control were authorized to make rules applying section 55 of the Lunacy Act, 1890, to voluntary and temporary patients received under the Act of 1930. The board have in fact made a rule applying section 55 (with modifications) to temporary patients, with the result that authorized absences of such patients are clearly on the same footing, for the purpose under consideration, as authorized absences of persons who are detained under the Act of 1890. For some reason of which I am not aware the board has not made a similar rule applying section 55 to voluntary patients, so that the position with regard to periods of absence by these patients is not as clear as it might be. But, whatever may be the reason for the board's omission, it does not alter the fact that the Act of 1930 envisaged the making of rules under which voluntary patients might be absent for temporary periods, and the word "continuously" in section 1 of the Act of 1950 must, therefore, in relation to voluntary patients also, be construed with due regard to that anticipation.

Accordingly, just as in the case of certified persons and temporary patients, so also with regard to voluntary patients it seems to me that the word "continuously" in the Act of 1950 is to be read as including periods of authorized absence in the legislative conception of continuity. Indeed, not to read it so would result in drawing a purposeless and wholly illogical distinction between absences by detained and temporary patients on the one hand and by voluntary patients on the other. On this construction of the section, and apart altogether from the fact that there was, in my opinion, actual continuity of treatment, the husband's visit to the Southern Hospital cannot be regarded as constituting an interruption of the requisite five-year period, for it took place with the approval (and indeed by the direction) of the mental hospital and is thus within the same category as any other authorized absence.

It appears to me that this conclusion accords not only with common sense but with the true object and intention of section 1 of the Act of 1950. That section was concerned to ensure that divorces should only be granted on proof of five years' continuous mental disability; and, provided that that is established (as it undoubtedly has been in the present case), it is, in my opinion, nihil ad rem that consistently with, and incidental to, the treatment for that disability periods of temporary absence are permitted to the patient away from the hospital or other place into which he has been received. I agree that the appeal should be allowed.

Appeal allowed.
Discretion of the court exercised in favour of wife.
Decree nisi granted.

Solicitors: *L. H. Whitlamsmith, Law Society; Official Solicitor.*

M. M. H.

BARNETT *v.* BARNETT.

1954
Oct. 15;
Nov. 24.

Husband and Wife—Divorce—Desertion—Termination—Initial desertion by husband—Possibility of husband's return decisively negatived by wife—Termination of desertion.

If the possibility of a deserting spouse returning has been decisively negatived by the other, then that party so rejects the deserter as to terminate the desertion.

Shortly after her husband had deserted her by leaving the matrimonial home, a wife changed the locks on the doors of the house and, thereafter, evinced by her attitude towards him and by letters written to him by her solicitors, a firm and settled intention never to have him back. The husband at no time made any approach to his wife with a view to returning to live in the matrimonial home. He was at the time he left, and remained, glad to be gone, and the wife was and remained, glad that he had left:—

Held, that the desertion had been terminated, for a wife should not be able to claim that she was being wronged by the continuing absence of a husband whom she had decisively declared that she would not have back, nor allege the continuance of desertion over a period during which she had evinced a firm and decisive determination that he should not return. She had firmly rejected him, and from a practical angle it was out of the question that he should make any attempt to go back.

Pratt v. *Pratt* [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437; *Cohen* v. *Cohen* [1940] A.C. 631; 56 T.L.R. 597; [1940] 2 All E.R. 331; *Harriman* v. *Harriman* [1909] P. 123; 25 T.L.R. 291 applied.

Church v. *Church* [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441; *Sifton* v. *Sifton* [1939] P. 221; 55 T.L.R. 339; [1939] 1 All E.R. 109; *Herod* v. *Herod* [1939] P. 11; 54 T.L.R. 1134 distinguished.

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DEFENDED PETITION for divorce, in which both parties alleged desertion from a date in August, 1950.

The parties were married in 1933, and there were three children of the marriage born in 1933, 1935 and 1940. The wife gave birth to a child in 1946, who survived for a few hours only, and whose paternity was in dispute. The parties lived an unhappy "cat and dog" life for many years until on or about August 13, 1950, when after a scene during a visit of the wife's sister and brother-in-law, the husband left the home in the late evening with a few personal belongings. Cohabitation was never resumed. On August 26, 1950, the husband went to the matrimonial home to fetch some more of his clothes. When he got there he found that his wife had changed the locks on the doors so that he could not get in. He fetched a police sergeant, and secured entry for the sole purpose of getting his clothes, which he took away.

On August 29, 1950, the wife's solicitors wrote to the husband requiring him to enter into a separation agreement and not to return to the home, and claiming maintenance. The husband called on the solicitor in answer and said that he would enter into the agreement and pay maintenance of £2 a week. The agreement was duly prepared, but never in fact executed; but the husband maintained payments of £2 a week.

On November 14, 1951, the wife wrote a letter to the husband asking him to return.

On December 10, 1953, the husband presented a petition for divorce, alleging expulsive conduct by the wife which was said to have consisted of improper associations with other men with whom she had confessed that she had committed adultery. The wife, by her answer, alleged that the husband had deserted her when he left her, and further relied upon the letter of November, 1951, as terminating her desertion, if desertion in August, 1950, were found against her.

Leave was given to the husband by consent at the close of the evidence to amend the petition to allege desertion from the date of the wife's alleged refusal to allow the husband to return home on August 26, 1950, reliance on the allegation of expulsive conduct being abandoned.

Geoffrey Crispin for the husband.
K. Bruce Campbell for the wife.

Cur. adv. vult.

November 24. SACHS J., reading his judgment, referred to the pleadings and continued: Each party by counsel concedes that the desertion alleged against the other is simple desertion: in neither case was need to tender amends pleaded, proved, or argued. That has not prevented either husband or wife in turn making in the witness box vitriolic accusations against the other. The husband on his side spared no effort to label his wife a faithless and adulterous woman. The wife, with uninhibited venom, tried to picture the husband as a cruel drunkard and a philanderer—charges for which one can search the pleadings without avail.

As witnesses, husband and wife were not ill-matched. Each in turn showed a fine disregard for accuracy on matters which were obviously within their knowledge. The observable manner in which each in turn gave testimony was such as to make it seem singularly unconvincing. In so far as either made allegations of affirmative facts in furtherance of their respective cases, or in attempted destruction of that of the opposite party, neither reached the lowest standard of reliability needed to secure a judgment of a court on any matter. A fortiori, they did not attain anything like the standard of reliability referred to in *Galler* v. *Galler*[1]—indeed, save for the police sergeant called as to some incidents of August 26, 1950, there was no witness on whom a court could reasonably rely.

In these circumstances I asked both counsel at the close of the evidence to consider the pleadings so as to make sure that they raised such points as they might seek to argue. It was then that Mr. Crispin asked for and obtained the leave to amend referred to earlier in this judgment.

This cause thus falls to be determined substantially upon those matters which are common ground, or which are so plain that reliance need not be placed on self-interested assertions by either party.

For a number of years before August, 1950, the husband and wife led what both counsel conceded to have been a cat and dog life. In view of the paucity—or rather the absence—of reliable evidence as to the causes of this state of affairs, I do not propose to attempt to determine who was the more to blame.

In mid-August, 1950, there occurred at the matrimonial home some sort of scene one evening when the wife's sister and the husband of that sister were both staying there. As to the precise course that events took that evening, none of the witnesses appears to be reliable. Accordingly, the only facts that I am

[1] [1954] P. 252; [1954] 1 All E.R. 536.

prepared to find relating to that evening are first, that at some time before 11 p.m. the husband left with a few personal belongings. Secondly, that he left because he was "fed-up." Thirdly, that before leaving he used words to the effect that he had had quite enough of it, that he was leaving, that they were not to trouble to find him, and that they would never see him again. And fourthly, that he is far from having proved that his departure was due to any expulsive conduct by his wife.

On August 26, 1950, the husband decided that he wanted to fetch some more of his clothes. When he got to the matrimonial home he found, however, that his wife had changed the locks on the doors so that he could not get in. So he sought the aid of a police sergeant, from whose testimony the above date can be fixed. With that backing he returned to the house and secured entry for the sole purpose of getting his clothes and duly took them away. Neither on that date nor on any other date has the husband made the vestige of an approach to his wife with a view to returning to the matrimonial home to live there, and I do not accept his evidence that on August 26, 1950, he was either minded so to do, or attempted so to do.

Just as the husband was and remained glad to be gone, so the wife was and remained glad that he had departed. She, in her turn, evinced a firm and settled determination never to have him back. The fact that she did not want to see him again (a fact which she admitted in evidence) was made clear to her husband at the time and to the court at trial, first, by the change of the locks with the intention of barring him from the home, secondly, by her attitude on August 26, 1950, as observed by the police sergeant, and thirdly, by the letters written on her behalf by her solicitors immediately following the above incidents. After watching her in court I was left in no doubt as to her determination being unshakable, or as to the clarity with which it was evinced to the husband.

Turning now to the correspondence of that period, the wife's solicitors on August 29, 1950, wrote: "We have been consulted "by your wife whom you deserted on the 13th instant, and "our instructions are to require you to enter into a separation "agreement . . . not to return to the home, and to live "separate." A claim for maintenance was also made. On September 14, 1950, the same solicitors wrote to the wife: "Your "husband called on us. He has agreed to sign the separation "agreement and to pay you £2 a week maintenance. We are "writing him again asking him to call and sign this agreement."

On September 18, 1950, the same solicitors wrote to the wife, "The agreement is now prepared and ready for your signature "and we shall be glad if you will call here for that purpose." In fact, however, the separation agreement does not appear to have been executed. The husband nevertheless sent his wife the £2 a week. Neither party elected to explain the reason for not signing a document as to the terms of which they appear to have been in agreement.

As regards the year that followed the departure of the husband there is no evidence that the wife changed her attitude towards her husband, or he his towards her, and the inferences are all the other way.

The only other fact to which reference need at this stage be made is that on November 14, 1951, the wife wrote an admirably phrased letter asking the husband to return. That letter is wholly out of character with what the wife has revealed herself to be in later letters, by her outbursts in this court, and by her conduct in the second half of 1950. I am far from prepared to hold that this letter was written bona fide. On the contrary, the rest of the evidence points to a continuation of her bitter determination not to have him back.

On the above set of facts Mr. Crispin conceded that the husband put himself in simple desertion when he left the matrimonial home. His plea that the husband made an attempt to resume matrimonial life on August 26, 1950, I have rejected, and thus his petition fails.

The husband, having in mid-August put himself into a state of simple desertion, the first point for decision in reference to the wife's cross-prayer relates to the effect of her clearly evinced determination not to have her husband back. The point was put that as the deserted spouse did not in any way intend to return (as is the fact) he was in no way prevented from returning by the wife being delighted to see him go or by the determination she evinced not to have him back, and that thus the husband remained in a state of continuing desertion as from that date in mid-August, 1950, when he left the matrimonial home.

Desertion, however, is a continuing matrimonial offence. Prima facie, it seems contrary to sound sense for a wife to be able to claim that she is being wronged by the continuing absence of a husband whom she has decisively declared she will not have back.

Turning to the authorities, I find that in *Pratt* v. *Pratt*,[2] when considering the principles applicable to the position where a deserted spouse refused to consider an offer by the offending spouse to return, Lord Macmillan, with the support of Lord Thankerton, said [3]: " In my opinion what is required of a petitioner for divorce " on the ground of desertion is proof that throughout the whole " course of the three years the respondent has without cause been " in desertion. The deserting spouse must be shown to have " persisted in the intention to desert throughout the whole period. " In fulfilling its duty of determining whether on the evidence " a case of desertion without cause has been proved the court " ought not, in my opinion, to leave out of account the attitude " of mind of the petitioner. If on the facts it appears that a " petitioning husband has made it plain to his deserting wife that " he will not receive her back, or if he has repelled all the " advances which she may have made towards a resumption of " married life, he cannot complain that she has persisted without " cause in her desertion."

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[2] [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437.

It is to be noted that this passage was quoted with approval by Lord Romer (himself a member of the House which considered *Pratt* v. *Pratt* [4]) when in *Cohen* v. *Cohen* [5] he delivered the speech with which all the other noble Lords concurred. Further, there are passages in *Harriman* v. *Harriman* [6] which seem to indicate a principle applicable to the position in the present case. Whilst Buckley L.J. made it on the one hand clear [7] that the mere fact of a wife being thankful that her husband has gone does not of itself prevent him from being in a state of desertion, Vaughan Williams L.J., when dealing with the effect of a separation order, stated [8] that it " negatived the " possibility of the husband returning to the wife unless by her " consent " and so precluded him from being in desertion. Fletcher Moulton L.J. said [9]: " It is impossible to hold that the " husband is committing a marital offence by non-cohabita- " tion when he has not the right to cohabit." Farwell L.J. referred to the fact that [10] " the wife who has rejected her " husband cannot call herself deserted by him " and cited Cockburn C.J. in *Ward* v. *Ward*,[11] where he said " the act of " desertion must be done against the will of the wife." Whilst finally Kennedy L.J. referred [12] to the difficulty of holding a husband to be in desertion when he was debarred from returning to the wife. This case of *Harriman* v. *Harriman*[13] was summarized by Lord Romer in *Cohen* v. *Cohen*[14] as being one in which it was put " out of the question that the husband should " make any attempt to return to the matrimonial domicile "; it was also referred to as being unquestionably rightly decided.[15]

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[3] [1939] A.C. 417, 420.

[4] [1939] A.C. 417.

[5] [1940] A.C. 631; 56 T.L.R. 597; [1940] 2 All E.R. 331.

[6] [1909] P. 123; 25 T.L.R. 291.

[7] [1909] P. 123, 148.

[8] Ibid. 134.

[9] Ibid. 137.

[10] Ibid. 146.

[11] (1858) 1 Sw. & Tr. 185.

[12] [1909] P. 123, 154.

As against the above, there could be prayed in aid certain passages in the judgment of Willmer J. in *Church* v. *Church*.[16] There, in deciding a case where the deserted spouse had confessed to adultery, he regarded the relevant part of Lord Macmillan's statement of the law in *Pratt* v. *Pratt*[17] as being obiter, unsupported by authority, and indeed in some degree contrary to authority. That view of Willmer J. appears, however, to have been founded to a considerable extent on the decision of Henn Collins J. in *Sifton* v. *Sifton*,[18] where the question turned largely on presumptions arising in a case where the deserted spouse had not evinced a determination parallel to that of the wife in the present case. Further, *Cohen* v. *Cohen*[19] was not cited to the court in *Church* v. *Church*[20]—and *Harriman* v. *Harriman*[21] appears not to have been mentioned either in *Church* v. *Church*[22] or in *Sifton* v. *Sifton*.[23]

It seems in any event doubtful whether the series of cases from *Herod* v. *Herod*[24] onwards, in which a deserted spouse has committed adultery (a fact which may or may not influence the mind and actions of the deserting spouse) are strictly in point here, when the wife has specifically and firmly barred the husband from that precise cohabitation the lack of which she now complains. Those cases are in the main concerned, as was *W.* v. *W.* (*No.* 2),[25] with presumptions relating to the intentions of the deserting spouse, and the facts which may rebut those presumptions, rather than with the effect of a specific and firm bar against return imposed on that deserting spouse. That distinction also appears implicit in an observation of Lord Romer made during counsel's argument as it appears in *Cohen* v. *Cohen*.[26] It seems to be a vital distinction—though I am not unconscious that some of the dicta in the cases relating to the effect of a deserted spouse's adultery are in terms wide enough to affect the position which arises in the case now under consideration.

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[13] [1909] P. 123.
[14] [1940] A.C. 631, 642.
[15] Ibid. 644.
[16] [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441.
[17] [1939] A.C. 417.
[18] [1939] P. 221; 55 T.L.R. 339; [1939] 1 All E.R. 109.
[19] [1940] A.C. 631.
[20] [1952] P. 313.
[21] [1909] P. 123.
[22] [1952] P. 313.
[23] [1939] P. 221.
[24] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.
[25] [1954] P. 486; [1954] 2 All E.R. 829.
[26] [1940] A.C. 631, 633.

For a wife to be in a position to assert in one and the same breath "I will not on any account have you back" and "You "are deserting me" would, however, constitute a somewhat artificial situation. That applies equally whether one looks at the position of the wife, who would be blowing hot and cold, or from that of the husband, who would be found guilty of not doing something which his wife was proceeding deliberately to bar him from doing. As I understand the principles enunciated in and inherent in *Pratt* v. *Pratt*,[27] *Cohen* v. *Cohen*[28] and *Harriman* v. *Harriman*[29] no such artificial situation is created by the law as it stands. On the contrary, they are to my mind authorities at least for the proposition that if the possibility of the husband returning has been decisively negatived by the wife then she so rejects her husband as to make her unable to call herself deserted by him.

If, in the other line of cases to which I have referred, passages occur which could be read in a contrary sense, then it yet seems to be my duty to follow the above three authorities, *Pratt* v. *Pratt*,[27] *Cohen* v. *Cohen*,[28] *Harriman* v. *Harriman*.[29]

Each case must, of course, turn on its own facts: and in each case it is a question of degree whether the wife has to the above extent rejected her husband. On the facts of the present case I take the view that here the wife cannot set up that the desertion by the husband continued over the period during which she had evinced to him a firm and decisive determination that he should not return to her. She firmly rejected her husband, and it was from a practical angle out of the question that he should make any attempt to return home. On that point accordingly the prayer of the wife's answer fails.

It is scarcely necessary to add that I am not, of course, here concerned with the position which may arise when a deserted wife determines not to have her husband back but does not make that fact clear to him.

I would also be prepared to dismiss the prayer of the wife's answer on the ground that the separation became consensual shortly after it occurred. A state of separation is not desertion without cause once the spouse alleging desertion consents to that

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[27] [1939] A.C. 417.

[28] [1940] A.C. 631.

[29] [1909] P. 123.

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state. The consent may be written, oral or by conduct. Here the evidence shows that both parties were by September 18, 1950, in agreement, both as to the fact that they should live apart and as to the terms on which they should so live. Accordingly, in the absence of further evidence, on the facts of this case the separation became a consensual one. I am inclined to think that the consent might also be put on another ground—that each party having made it plain to the other that he or she would on no account live with that other in future, such a state of affairs constitutes in itself a separation by consent: but I prefer to base the rejection of the wife's prayer on the other ways of putting the position. In the result, the prayers in the petition and answer are alike rejected.

Prayer of Answer rejected.
Petition dismissed.

Solicitors: *Pennington & Son for Church, Bruce & Co., Gravesend; G. E. C. Dougherty, Law Society, Divorce Department.*

J. B. G.

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10, 13.

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Husband and Wife—Divorce—Desertion—Termination—Initial desertion by husband—Decisive determination by wife against reconciliation—Determination evinced to husband—Termination of desertion.

The wife withdrew from the marriage bed in January, 1947, because of her suspicions concerning her husband's association with another woman. Those suspicions were reasonable at the time, although as she never attempted to find out the true facts it was held that her alleged belief in his adultery did not necessarily remain reasonable up to the date of divorce proceedings begun in 1953.

The husband, however, allowed relations to deteriorate, and on one occasion in 1948 he assaulted the wife; he never asked her to return to his bed, or sought to convince her of his innocence. In June, 1949, he ceased to support her; in September, 1949, he threw her clothes from his bedroom and kept the door locked against her. Thereafter he made no attempt to approach his wife except to try to take his meals into her room.

Shortly after the husband locked his door against the wife, the wife locked her door against the husband, and told him that if he would not have her, she would not have him. The parties continued to live in the same house, but in circumstances amounting to a de facto separation:—

Held, (1) that, since the husband by his conduct brought cohabitation to an end, and made it abundantly clear to his wife that he never intended in any circumstances to have her back, the initial de facto separation was due to an act of desertion on the part of the husband, for which at no time did he seek to make amends.

(2) That both by her act in locking her door, and by her words, the wife evinced to the husband a firm and decisive determination that he should not return to her. That conduct followed so swiftly after the husband's act of desertion as not to afford him any reasonable locus poenitentiae, and effectively prevented him thereafter from approaching her by the most suitable method reasonably open to him. Having evinced that determination in advance, and put it out of the husband's power, had he been so minded, to return to her, she must be taken to have been in law in the same position as if a bona fide approach for reconciliation had been made to her and rejected.

(3) That the initial desertion by the husband was therefore terminated by the conduct of the wife.

Barnett v. *Barnett*, ante, p. 21; [1954] 3 All E.R. 689 followed.

Church v. *Church* [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441 distinguished.

DEFENDED PETITION for divorce, in which both parties alleged desertion.

The parties were married in 1919. For many years the husband was employed by Trinity House in the lighthouse service, and the parties lived together at various addresses accordingly. In 1940 the husband changed his employment, and the parties lived from then until the hearing of the suit at a house in Abbey Wood, London, which they purchased through a building society, and which was registered in the names of both of them. The legal estate in the house was declared in 1952 by a consent judgment of the Woolwich County Court, following upon proceedings initiated by the husband under the Married Women's Property Act, 1882, to be vested in both parties as joint tenants; both were to be at liberty to continue to occupy such respective parts of the premises as they were then occupying.

Although the parties continued to live in the same house, the court found upon the evidence that from at least 1949 they had lived completely separate and apart, each keeping to his or her own part of the house, and having no common life; the parties themselves did not dispute the existence of two separate households during the relevant period of alleged desertion.

The early history of the marriage was reasonably happy, and it was only after the husband had left the lighthouse service that the parties drifted apart. The wife gave evidence that for some years she had suspected him of associations with other women, and that in 1938 she had found a contraceptive in his pocket although he did not use them with her. She alleged that in 1946 he took to going out by himself every Sunday afternoon, returning home late at night, and refused to say where he had been when challenged; that she began to notice stains as of lipstick on his handkerchief; but the husband denied that they were lipstick stains, although he admitted that he had told the wife on one occasion when she tackled him that a mark was caused by dye from paints with which he was working. In his evidence he suggested that the stains might have been due to a red crayon which he carried in his pocket.

In January, 1947, the wife's suspicions became so strong that she began to intercept the husband's letters, two of which were in extremely affectionate terms and signed "Betty." The wife kept these letters without telling her husband for several years, producing them for the first time during unsuccessful proceedings before the justices. She spoke to her husband about the association, however, but he declared that there was "nothing in it" and that "Betty" was merely one of his customers. The wife did not accept his explanation and she withdrew from the matrimonial bedroom.

After January, 1947, the parties never slept together, but they continued for the time being to live as one household, although on bad terms with each other, until about the middle of 1949. The husband continued to pay the wife a weekly housekeeping allowance, and the wife continued cooking for the husband and performing other housewifely duties. During a quarrel in May, 1948, the husband struck the wife, and was bound over to keep the peace after the wife had summoned him for assault.

The sequence of events leading up to the final separation in 1949 was the subject of a considerable conflict of evidence, and those events are considered in the judgment. The court found that the husband ceased to pay any weekly allowance at all to the wife after June 18, 1949, but that the wife continued cooking for the husband until July 2, 1949, when she went away for a week's holiday. After her return she ceased to perform any household duties for the husband. Shortly after her return she issued a summons alleging wilful neglect to maintain. It was adjourned on August 9, 1949, and negotiations between the parties followed. The court accepted evidence that the husband offered

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25s. a week upon the basis that the wife left. The wife refused the offer and asked for £2 a week. The husband raised his offer to 30s. a week upon the same condition. Nothing came of those negotiations. It was also found that the husband threw the wife's clothes out of his room, which he thereafter kept locked, on September 2, 1949. The adjourned summons was restored, and dismissed on November 3, 1949. Shortly after the dismissal of her summons the wife fitted a Yale lock to her own door for the express purpose of keeping the husband out, because he was insisting on bringing his meals into her room. In her evidence she said: "I told him that if he would not have me, I would "not have him." From that time onward the separation was complete.

The parties continued living separately but in the same house, the husband contributing nothing to the wife by way of housekeeping or maintenance, each of them paying a share of the outgoings, and each receiving a share of the rent derived from the letting of the upper floor. In 1952 the husband brought the proceedings already mentioned in the Woolwich County Court under the Married Women's Property Act, 1882, in respect of the house. Shortly afterwards the wife had to give up work, and had not, in fact, been able to work since. She issued another summons, dated December 4, 1952, alleging both desertion and wilful neglect to maintain, which was heard on January 11, 1953, when both the wife's charges were dismissed.

The husband filed his petition in November, 1953, alleging desertion by the wife. The wife's answer, filed in April, 1954, originally consisted of a bare denial; voluntary particulars of the answer were later filed, alleging in the alternatives that the separation was consensual, that the wife had just cause for living apart, and that it was the husband who had driven the wife out and who was therefore the deserting party. Leave was given at the hearing at the conclusion of the evidence for the wife to amend her answer by adding a cross-prayer for dissolution on the ground of desertion by the husband. Leave was also given at the hearing to amend the husband's particulars of desertion on two occasions, so that they should be in accordance with the evidence given; and the wife was also given similar leave to amend the particulars of her answer.

James Miskin for the wife. The husband's conduct was expulsive, and since July, 1949, he has made it clear to the wife that he never wanted to have her back. The wife's conduct is to

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be distinguished from that of the wife in *Barnett* v. *Barnett*[1]; for she had in this case in effect been expelled by the husband, who had clearly shown his intention to remain apart. The position was analogous to that in *Church* v. *Church*,[2] and there was nothing to rebut the presumption that the husband's desertion continued. [Reference was also made to *Lang* v. *Lang*[3] and *Marcroft Wagons Ld.* v. *Smith*.[4]]

Eric Crowther for the husband (after submitting that on the evidence the wife had been the original deserting party). But if it be assumed that the husband deserted the wife, she prevented the possibility of a reconciliation by locking her door to prevent him having his meals in her room, and she did so at a time when that possibility was most hopeful. The case is indistinguishable from *Barnett* v. *Barnett*.[5] [Reference was also made to *Forbes* v. *Forbes*[6] and *Baker* v. *Baker*[7] on the question of the wife's alleged belief that the husband had committed adultery.]

Cur. adv. vult.

December 13. WILLMER J. outlined the facts, and held that the test laid down in *Hopes* v. *Hopes*[1] as to the parties living in two separate households was abundantly satisfied. There was no doubt as to the factum of separation. His Lordship continued: The difficulty has been to ascertain which of the parties it was who was responsible for bringing that separation about, and more particularly, to draw the correct inference as to the animus of the respective parties during the statutory period of three years immediately preceding the presentation of the petition and answer respectively. Except for some brief and rather vague evidence given by a daughter-in-law, I have nothing to go on but the evidence of the parties themselves, supplemented by a few contemporary letters, and also by the note of what each of them said in the evidence given at the previous hearings. I regret to have to say it, but I confess that I found the evidence of both parties very unsatisfactory. Each of them was obviously harbouring feelings of deep resentment against the other, and this fact, as it seemed to me, coloured

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[1] Ante, p. 21; [1954] 3 All E.R. 689.

[2] [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441.

[3] [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571.

[4] [1951] 2 K.B. 496; [1951] 2 All E.R. 271.

[5] Ante, p. 21.

[6] [1954] 3 All E.R. 461.

[7] [1954] P. 33; [1953] 2 All E.R. 1199.

[1] [1949] P. 227; 64 T.L.R. 623; [1948] 2 All E.R. 920.

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their evidence throughout. Both of them departed widely in their evidence from the cases set out in their respective pleadings. [His Lordship referred to the amendments which had had to be made and said:] Neither side's pleaded case makes any reference whatsoever to that which, in my view, was perhaps the most important circumstance of all, namely, the fact that at some time both parties locked the doors of their own rooms against the other.

This discrepancy between pleaded and proved cases on both sides makes it difficult for me to accept the word of either party where it was in conflict with that of the other, except where it is corroborated by some of the independent contemporary evidence to which I have already referred, or by the essential probabilities of the case. [His Lordship referred to the demeanour of the parties, saying that the wife made a better showing than the husband, but that the husband had the advantage of having successfully resisted the wife's applications to the justices.]

As I have said, the crucial period for the determination of this case is that which elapsed between the time when the wife left the husband's bedroom and the time when the parties finally separated, in the sense that they began to live as two households. I turn now, therefore, to the task of setting out as briefly as possible my findings of fact in relation to this period. I am satisfied that the wife is accurate in stating that she withdrew from her husband's bedroom in January, 1947, following her interception of the letters from the woman Betty. There is no doubt that the husband assaulted the wife in May, 1948, and I have little difficulty in drawing the inference that from 1947 onwards the parties were on increasingly bad terms. I accept the wife's evidence, however, that she continued cooking and performing other wifely duties for the husband. Some time at the end of 1948, or early in 1949, there was a dispute because the husband reduced the weekly allowance from £3 to £2 10s. That, I have no doubt, further exacerbated the feelings between the parties. I accept the wife's evidence that after June 18, 1949, the husband ceased to pay any weekly allowance at all. The true explanation for this must remain, to some extent, a mystery. The most likely inference, I think, is that it was merely a symptom of the mounting tension between the parties, although I am not blind to the fact that it may well have been prompted by, at any rate, some diminution in the services which the wife was rendering to the husband. The wife says—and I am prepared to accept it—that she did continue cooking for the husband until July 2, 1949, when she went away for a week's holiday with one of her sons. After her return from that holiday she admits that she ceased altogether to perform any wifely duties for the husband.

I infer—although it was not stated in evidence—that the wife took legal advice on her return from the holiday, for shortly afterwards she issued her summons for wilful neglect to maintain. At the first hearing, on August 9, 1949, the husband is recorded as saying that he was willing to pay the wife, although it is clear that no payment had, in fact, been made since June 18, 1949. Whether it was at the first hearing, or whether it was in the course of negotiations which followed this hearing, it is clear that the husband offered 25s. per week. The wife said, however (and the husband ultimately agreed with some reluctance in cross-examination) that this offer was on the basis that the wife left. The wife refused to accept 25s. a week and held out for £2 a week. It is clear from a letter written by the wife some time between the first and second hearings, that the husband subsequently raised his offer to 30s. a week; but I infer that this was again subject to the wife leaving. Nothing, in fact, came of these negotiations, and the summons was accordingly restored.

In the meantime, however, there was an event of crucial importance, in that the husband threw the wife's clothes out of his room, which he thereafter kept locked against her. The husband himself said that he had taken to locking his door against the wife within a very short time after the wife had withdrawn from his bedroom, but on this I do not think he is to be believed. A letter written by the wife to her then solicitor on September 5, 1949, makes it clear that the incident of the clothes, followed by the locking of the door, only took place on the previous Friday, and that, according to my reckoning, would be Friday, September 2, 1949. I find it difficult to understand why at the resumed hearing on November 3, 1949, no reference appears to have been made by the wife to the events of September 2; nor is there any record of any reference to the fact, now admitted by the husband, that he had offered to pay the wife a weekly sum if she would go away and live elsewhere. I am driven to infer that at that resumed hearing the wife's case was not very fully or adequately presented. No reasons were stated for the magistrate's decision, but the summons was dismissed. The wife says—and I accept her evidence on this point, for in part at least it is an admission against her own interests—that it was shortly after the dismissal of her summons that she fitted a Yale lock to her own door for the express purpose of keeping her husband out, because he was insisting on trying to bring his meals into her room. She added these important words: "I told him that if he would not have "me, I would not have him." From that time onwards the separation between the parties has been complete. Moreover, in spite of his statement at the hearing in August, 1949, that he was willing to pay his wife, the husband has not, in fact, since that date made any effort to maintain her, even after she ceased to earn her own living by working.

In the light of these findings as to the sequence of events during the material period, it is necessary to consider the allegation of desertion which each party makes against the other. So far as the husband is concerned, he admitted in cross-examination that for years he has hated his wife like poison and has long since lost any desire to live with her. I appreciate that, as was pointed out by the Privy Council in *Lang* v. *Lang*,[2] desire is by no means the same thing as intention, and that it is intention only which is material in considering a charge of desertion. I only mention the husband's freely admitted desire because in this case it appears to me on the facts that desire and intention go hand in hand. I am satisfied that the husband's behaviour in 1946 and early 1947—his staying out every Sunday afternoon and evening, and refusing to give any reason; and the discovery of stains resembling lipstick on his handkerchiefs, as to which I substantially accept the wife's evidence—gave her grounds for suspecting that the husband was carrying on some sort of association with another woman. The discovery of the contraceptive in 1938 was not of particular significance, and in view of the fact that it was followed by eight years of normal marital relations, could not by itself be relied on by the wife as an excuse for withdrawing in 1947. The incident does, however, have just this significance: that it gave the wife some additional ground for suspecting the husband's behaviour in 1946 and 1947. When this behaviour was followed by the interception of the two letters from the woman Betty, for which neither at the time nor in evidence here was the husband able to offer any credible explanation, the wife had, in my judgment, abundant justification for withdrawing from the husband's bedroom. I think that there is some force in the comment made by counsel for the wife that no attempt was made by the husband to obtain the evidence of the woman Betty, nor that of the husband's sister, who, it is said, was the real (and perfectly innocent) cause of the husband's Sunday afternoon outings.

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[2] [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571.

I pause here to remark that I am only concerned at the moment with the wife's withdrawal from the marriage bed. It was part of the wife's case, as put forward in the further and better particulars of the answer, that her later withdrawal from cohabitation was, in part at least, justifiable on the ground of a reasonable belief on her part that her husband had been guilty of adultery; and some argument was addressed to me on this point, in the course of which *Baker* v. *Baker*[3] was cited. If this argument had been pressed, I should have felt some difficulty in acceding to it, in view of the fact that no actual charge of adultery has ever been put forward, and that at no time during the eight years which have elapsed does the wife appear ever to have investigated the matter. Her belief in the husband's adultery may have been reasonable enough, in view of all the suspicious circumstances, in 1947; but it does not follow that it continued to be reasonable during the three years immediately preceding the presentation of the answer, having regard to the wife's total absence of effort during all this time to ascertain the true facts. In this connexion I would respectfully adopt words used by Davies J. in *Forbes* v. *Forbes*[4]: "the fact that "a petitioner has not chosen to bring and does not now make "a charge of adultery may well be a most relevant matter for "consideration when the court is asked to find that the petitioner "on reasonable grounds believes, and has believed for three "years preceding the presentation of the petition, that the "respondent had committed adultery." For these reasons I regard the wife's reasonable suspicions in January, 1947, as no more than justification for her temporary withdrawal from the husband's bed.

But what followed? The husband does not appear ever to have invited her to return. Nor is there any evidence that he sought at any time to make amends, or to convince the wife of his innocence. He was content to allow relations with his wife to deteriorate still further, and in 1948 was found guilty of assaulting her. The culmination came in June, 1949, when he ceased to support her, and for no sufficient reason that I have been able to find. When the wife issued her summons he expressed his willingness in court to pay her, but in fact has never done so: on the contrary, he made it clear, as I find, that he was only prepared to pay her on terms that she should withdraw and live elsewhere. Finally, he threw her clothes out of his room, which had been the matrimonial bedroom, and took to keeping the door locked against her, thereby making it as clear as he could that he wanted no more to do with her. That was five years ago, and since that date there is no evidence to show that he ever altered his mind, that he ever made any offer of amends, or indeed, that he ever tried to approach the wife, except to the extent that, according to the wife's evidence, he persisted for a time in trying to take his meals into her room.

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[3] [1954] P. 33; [1953] 2 All E.R. 1199.

[4] [1954] 1 W.L.R. 1526, 1534; [1954] 3 All E.R. 461.

In those circumstances, it appears to me quite hopeless for the husband to contend now that during the three years immediately preceding the presentation of the petition his wife was separated from him without his consent. At the best he made it abundantly clear by his conduct that he never intended in any circumstances to have the wife back; at the worst, he himself was guilty of expulsive conduct. In neither case could his petition succeed.

As I am now also concerned with the wife's cross-charge of desertion, it is necessary for me to resolve that question; and I would say at once that, in my judgment, the proper inference to be drawn from the husband's conduct is that he expelled his wife, and that it was he who by his conduct brought the cohabitation to an end. I find accordingly that the de facto separation between the parties, which has subsisted since the autumn of 1949, was in fact initially brought about by an act of desertion on the part of the husband, for which at no time since has he sought to make amends. What, then, of the wife's cross-prayer for relief? The question is whether she can satisfy me that the separation initiated by the husband's act of desertion continued to be without her consent during the statutory period, having regard to the fact that shortly after the husband left she locked him out of her room, and at the same time told him that if he would not have her she would not have him.

On behalf of the husband it is contended that those facts are indistinguishable from the facts in *Barnett* v. *Barnett*,[5] recently before Sachs J., and that the wife's cross-prayer must accordingly fail. The facts in that case were that the wife, who had been deserted by her husband, changed the lock on her front door immediately after his departure for the express purpose of preventing him from returning; and when he did shortly afterwards come to the house for the purpose of collecting his clothes she made it abundantly clear to him that she would not ever receive him back. In such circumstances, Sachs J. held that the wife could not set up that the desertion of the husband continued over the period during which she had evinced to him a firm and decisive determination that he should not return to her.

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[5] Ante, p. 21; [1954] 3 All E.R. 689.

On behalf of the wife it was contended that the facts in this case are distinguishable from those in *Barnett* v. *Barnett*.[5] It was said that the inference as to the wife's intention which might otherwise be drawn from the fact of her locking her door was rebutted by evidence which she gave to the effect that in certain conditions she would have been prepared to return to her husband; that the act of locking her door, in the circumstances of this case, was no more than her natural reaction to her husband's behaviour in expelling her from his room; and, therefore, it affords no evidence of any intention on her part to bring the cohabitation to an end. On the contrary, it was argued that the wife in this case, having been expelled, was to be regarded in law as being in the same position as if she had gone to live elsewhere, in which case it would have been natural to keep her door locked against her husband, just as much as against anyone else, until some move was made by the husband to approach her.

On the wife's side reliance was placed upon a decision of my own in *Church* v. *Church*.[6] That was a case in which a husband who had been deserted by his wife in 1946 committed adultery in 1949, wrote a letter to his wife informing her of this adultery, and stating that he never intended to return to her, and invited her to bring divorce proceedings against him. The wife took no action. The husband then took proceedings on the ground of the wife's desertion. It was argued on behalf of the wife that when the husband communicated to her his irrevocable intention never to have her back the separation was no longer without his consent, and he could, therefore, no longer allege desertion. I held, however, that in the absence of any approach by the wife, whose state of mind was quite unaffected by hearing of the husband's adultery, there was nothing to stop the wife's desertion from continuing to run. In the present case it has been argued on

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[5] Ante, p. 21; [1954] 3 All E.R. 689.

[6] [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441.

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behalf of the wife that the decision in *Church* v. *Church*,[6] whereby it was held that the husband who, having committed adultery, communicated to his wife his intention not to have her back, was not debarred from asserting that his wife's desertion continued, should apply in the case of the wife here, notwithstanding the fact that by locking her door she was, inferentially at least, communicating to her husband her intention never to receive him back.

In *Barnett* v. *Barnett*[7] Sachs J. clearly had some difficulty in reconciling what I had said in *Church* v. *Church*[8] with various dicta of members of the House of Lords in *Pratt* v. *Pratt*[9] and *Cohen* v. *Cohen*[10] and with the decision of the Court of Appeal in *Harriman* v. *Harriman*.[11] It may well be that in *Church* v. *Church*[12] I used words which went beyond what was necessary for the case, and which conflicted with what was said by the House of Lords and the Court of Appeal in the cases referred to. Be that as it may, I do not think that this case is governed by the decision in *Church* v. *Church*.[12] It seems to me to be clearly distinguishable. In the first place, there is no question in this case of adultery on the part of the deserted spouse. Secondly, in *Church* v. *Church*[12] the deserted husband's intention not to receive his wife back was not communicated to her until a considerable time after the wife's desertion—in fact, the three years' period had already nearly elapsed. Over the intervening period the deserting wife's unshakeable determination never to return had already been made apparent. In the present case, on the other hand, the wife's act in locking her door against the husband followed so swiftly after his act of desertion as not to afford him any reasonable locus poenitentiae. Thirdly, the deserted husband's communication to his wife in *Church* v. *Church*[12] did nothing to prevent the wife from making overtures, however belated, for a reconciliation; whereas here the act of the wife in locking her door, and keeping it locked against her husband, effectively prevented him thereafter from approaching her by the most suitable method reasonably open to him: indeed, on the wife's own evidence it can be put even higher against her, for she said that she only did it to prevent him taking his meals in her room, which it may well be thought might have provided him with most suitable opportunities to make overtures for a reconciliation.

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[6] [1952] P. 313.

[7] Ante, p. 21.

[8] [1952] P. 313.

[9] [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437.

[10] [1940] A.C. 631; 56 T.L.R. 597; [1940] 2 All E.R. 331.

[11] [1909] P. 123; 25 T.L.R. 291.

[12] [1952] P. 313.

I have come to the conclusion that it is quite impossible to distinguish this case from *Barnett* v. *Barnett*.[13] The act of the wife in fitting a Yale lock to her door could only have been directed against the husband, in the same way as the wife's act in changing the lock in that case was clearly directed against the husband. What the wife in this case did in fitting the lock must be taken in conjunction with what, on her own evidence, she said to the husband at the time. Both by her act and by her words this wife evinced to her husband a firm and decisive determination that he should not return to her. Having evinced that determination in advance, and having, as it were, put it out of the husband's power, had he been so minded, to return to her, it seems to me that she is, in law, in the same position as she would have been if he had made a bona fide approach for reconciliation which she rejected.

In the result, I am satisfied that neither of these parties is entitled to the relief prayed for. It may perhaps seem unfortunate that a marriage which has so palpably broken down, and which for many years now has been a marriage in name only, should not be dissolved; but I am satisfied that my decision is in full accord with the realities of the case. The one thing that has been abundantly clear throughout the hearing of this case is that neither of these parties at any time within the three years immediately preceding the institution of the suit ever had the slightest desire or intention of resuming cohabitation with the other.

There is one other matter to which I should refer briefly. It was at one time suggested by counsel for the wife (I would remark that this was before he had been instructed to ask leave to amend his answer by including a cross-prayer for relief) that the consent judgment obtained in the Woolwich County Court in 1952 constituted evidence that from that time onwards, at any rate, the separation was consensual, on the ground that each of the parties then consented to the other continuing to occupy such respective part of the premises as was then occupied. I find it impossible to construe the terms of this judgment as a consent to continued separation. It seems to me to do no more than provide that neither party should seek to evict the other, and otherwise to leave the position precisely as it was before. I wish to make it clear, therefore, that I do not found my decision on

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[13] Ante, p. 21.

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any inference to be drawn from the terms of the consent judgment in the county court proceedings.

Prayer of answer rejected.
Petition dismissed.

Solicitors: *H. E. Thomas & Co.; L. H. Whitlamsmith, Law Society, Divorce Department.*

J. B. G.

1954
May 11, 12.

Mr. Commr. Grazebrook Q.C.

B. *v.* B.

Husband and Wife—Nullity—Incapacity—Deformity—Artificial sexual organ.

A wife respondent in a suit for nullity of marriage had undergone an operation to create an artificial vaginal passage:—

Held, that even if that operation had made complete connexion possible, there could be no vera copula in such circumstances, the defect was incurable, and the marriage should be annulled.

D. v. *A.* (1845) 1 Rob.Ecc. 279 applied.

PETITION by husband for nullity of marriage on the ground of incapacity.

The wife was born with certain male organs which were removed by operation when she was some 17 years of age. She had no vagina; her general physical appearance was inconsistent in some other ways with a normal female, and she had no menstrual periods. In February, 1949, she went through a ceremony of marriage with the husband, and there was a conflict of evidence whether or to what extent he knew of her incapacity, although it was agreed that he knew that she could not have a child. It was admitted that she was then "incapable of consummating "the marriage owing to the malformation of the structure of her "sexual organs," but she alleged that her incapacity was curable by surgical means.

Attempts to effect penetration in February and March, 1949, were admitted to have been wholly unsuccessful. The wife alleged that the husband had been told that penetration would be impossible without an operation. The husband denied such knowledge, saying that he had only been informed of a toughness of the hymen which might require surgical cure.

In March, 1949, the wife underwent an operation, and an artificial vaginal passage of some four to six inches was created, a cylindrical mould of that length being temporarily inserted to assist in the formation of the passage, and in the healing of skin which had been grafted in it. It was stated in evidence by the wife that certain dilators had been used by her after her return from hospital, where she spent some two to three weeks. There were no attempts at connexion during this period. In the summer the husband was ordered abroad on duty. The wife underwent a further operation in July, 1949.

In September, 1949, the husband was given leave to return to England. The mould was not then in position and was not reinserted. Between September, 1949, and April, 1952, there were frequent attempts by him to effect penetration. The husband said that he was unable to penetrate more than two inches, and it was proved that at some stage there was a considerable closure of the passage. The wife alleged that complete, or almost complete, penetration of the passage had been effected. In April, 1952, the husband, who had received certain advice, left the wife, and they never lived together again.

A plea in the answer of approbation and insincerity was not persisted in.

Philip Cox for the wife. In *D.* v. *A.*,[1] which was approved in *Baxter* v. *Baxter*,[2] it appeared that Dr. Lushington would have refused a decree had he been satisfied that the short vaginal passage might be elongated by surgical art or skill so as to render the wife capable of a vera copula, although the vagina consisted of a cul de sac without apparent means of communication with any internal organ, and there appeared to be no uterus. Provided that the wife had a vaginal passage of sufficient length to permit normal penetration, then she would be capable of consummating the marriage although that passage had been artificially created.

It is submitted upon the evidence that full penetration of this nature was in fact effected; but even if it had not been, the defect in the wife was shown to be curable. . The principles upon which the ecclesiastical courts acted are applicable in cases of nullity on the ground of incapacity: see, for example, *Harthan* v. *Harthan*,[3] section 22 of the Matrimonial Causes Act, 1857, and sections 33 and 103 of the Supreme Court of Judicature (Consolidation) Act, 1925. The impediment to consummation "must be shewn to "have existed at the time of the marriage, and to be incurable":

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[1] (1845) 1 Rob.Ecc. 279, 300.

[2] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.

[3] [1949] P. 115; [1948] 2 All E.R. 639.

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Brown v. *Brown*.[4] Although the words "and such incapacity "is incurable by art or skill and will so appear on inspection" were ordered to be struck out by Sir Francis Jeune P. in *F.* v. *P.* (*falsely called F.*)[5] as "mere surplusage," that was a case where the facts pointed "to some sort of incapacity arising from "nervousness, hysteria, or unconquerable aversion," and in which the question of curability might have seemed out of place. Although that phrase was taken up by Sir Samuel Evans P. in *Dickinson* v. *Dickinson* (*otherwise Phillips*),[6] that was a case of wilful refusal in which curability would clearly not arise. [He referred to *Napier* v. *Napier* (*otherwise Goodban*)[7] as overruling the decision that wilful refusal might be a ground for nullity.] The necessity to establish incurability was recently considered in *H.* v. *H.*[8]

R. G. Micklethwait for the husband. Even if the artificial passage permitted, or could be made to permit, full penetration, such penetration could not amount to "ordinary and complete "intercourse": if the relations are "so imperfect as scarcely to "be natural . . . legally speaking, it is no intercourse at all": *D.* v. *A.*[9] The vagina in that case was a natural one, and the question was whether the natural formation might be lengthened; it was not a wholly artificial channel created by surgery. Emission, or ability to emit, is not essential to consummation: *R.* v. *R.*[10]; and if connexion by an artificial vagina were held to amount to consummation, the same principle would be applicable if connexion were achieved by a husband whose defect had been overcome by the provision of an artificial organ.

MR. COMMISSIONER GRAZEBROOK Q.C. The husband seeks a decree of nullity of his marriage on the ground that the marriage has not been consummated because of the incapacity of the wife. The wife by her answer denies that the marriage has never been consummated and denies that she has been incapable of consummating it. There were certain further pleas relating to this matter, including a plea of want of sincerity, but those pleas were abandoned before the case was started. [The commissioner stated the facts and accepted the husband's evidence that he was unaware before the ceremony of marriage of the true nature of the incapacity or of the necessity for an operation of the nature in fact performed before there could be penetration. The commissioner said that the husband's evidence that he had never been able to effect penetration of more than some two inches after his return in September, 1949, was more probable in view of medical evidence that the mould had not been in position for a sufficiently long time before his return. The commissioner continued:]

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[4] (1828) 1 Hagg.Ecc. 523.

[5] (1896) 75 L.T. 192, 193.

[6] [1913] P. 198; 29 T.L.R. 765.

[7] [1915] P. 65, 184; 31 T.L.R. 472.

[8] (Unreported) March 30, 31, 1954 (Final list of appeals, No. 28).

[9] 1 Rob.Ecc. 279, 298.

[10] [1952] W.N. 236; [1952] 1 T.L.R. 1201; [1952] 1 All E.R. 1194.

It is clear on the evidence that at the time of the ceremony of marriage it was impossible to consummate the marriage by reason of the defect in the wife. It is clear also, from the medical inspectors' report, that at the time they carried out their inspection on June 25, 1953, they found that sexual intercourse was not then possible.

As submitted in the course of argument, this court acts on the principles that governed the ecclesiastical courts. The husband, in order to succeed in his petition, has to satisfy the court that the marriage has not been consummated and, in addition, as I think, he has to satisfy the court that any impediment is incurable. Apart from what used to be the practice in the ecclesiastical court of requiring the incurability to be proved, the allegation that is made in the petition, that the wife was "at "the time of the said ceremony of marriage and has ever since "been incapable of consummating the same," imports the possibility that if there were an impediment at the time of the marriage it might be curable, and that it should be cured if it were possible to do so.

The question which I have to determine on the evidence is whether there has been consummation of this marriage. This question of consummation or non-consummation is a somewhat difficult matter to decide, but there is a certain amount of assistance given in the authorities. The main authority to which I was referred was *D.* v. *A.*,[1] in which there was a malformation of the sexual organs of the wife which only allowed of partial connexion. There was only a malformation; there was nothing, as I understand it, artificially created. Dr. Lushington, dealing with this question of sexual intercourse, said[2]: "Sexual "intercourse, in the proper meaning of the term, is ordinary "and complete intercourse; it does not mean partial and "imperfect intercourse: yet, I cannot go the length of saying "that every degree of imperfection would deprive it of its "essential character. There must be degrees difficult to deal "with; but if so imperfect as scarcely to be natural, I should

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[1] (1845) 1 Rob.Ecc. 279.

[2] Ibid. 298.

"not hesitate to say that, legally speaking, it is no intercourse "at all. I can never think that the true interest of society would "be advanced by retaining within the marriage bonds parties "driven to such disgusting practices. Certainly it would not "tend to the prevention of adulterous intercourse, one of the "greatest evils to be avoided." Dealing with the evidence in that case, Dr. Lushington said: "There is, I think, some "ambiguity in the evidence. The two witnesses are both agreed "as to the connexion being imperfect; but I am not satisfied as "to the true meaning of their evidence as to incurability. In "one sense of the term, there can be no doubt, namely, that as "relates to conception, the malformation is incurable; but it is "to me doubtful whether they mean that it is incurable as to the "mere coitus. In this difference, I think, lies the true distinc- "tion. If there be a reasonable probability that the lady can be "made capable of a vera copula—of the natural sort of coitus, "though without power of conception—I cannot pronounce this "marriage void. If, on the contrary, she is not and cannot be "made capable of more than an incipient, imperfect, and un- "natural coitus, I would pronounce the marriage void." That decision was approved by the House of Lords in *Baxter* v. *Baxter*.[3]

The main matter to be considered in coming to a conclusion in this case is what amounts to consummation. It is said on behalf of the wife that it is sufficient if it is possible for a husband to have an erection and penetrate into the female body. On the other hand, it is submitted on behalf of the husband that it cannot be said that there is consummation of a marriage where the husband's erection penetrates into an artificial passage which in effect has no relation to the organ which should be there in the wife. It is carried further on behalf of the husband, and submitted that if the court were to hold that connexion in those circumstances was consummation of a marriage it should hold that there was consummation in a case where a man who had no sexual organ was provided with a sexual organ with which he could penetrate the wife.

Applying what was said by Dr. Lushington in *D.* v. *A.*,[4] it seems to me that there cannot be said to have been proper consummation in the present case. This was a mere connexion between the parties if it occurred to the extent suggested by the wife and was nothing which could be said to be vera copula or proper coitus between husband and wife. It follows from what I

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[3] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.

[4] 1 Rob.Ecc. 279, 298.

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have said that, in the first place, I accept the husband's evidence rather than that of the wife in regard to the matters in which there is variance between them, and I am satisfied that this marriage was not consummated.

Even if the wife had satisfied me that there was connexion of the nature she suggested, I do not consider that it could be held to be consummation in the circumstances, having regard to the artificiality of her organ. Further, the conclusion I have come to in regard to the question of curability is that it would be impossible in this case for the reasons which I have given to cure the defect in the wife to the extent of making her in the real sense of the term capable of having sexual relations with her husband.

In these circumstances the petition succeeds, and I pronounce a decree nisi on the ground of the wife's incapacity to consummate the marriage.

Decree nisi.

Solicitors: *Field, Roscoe & Co. for Brain & Brain, Reading; Tuck & Mann for H. B. Keight, Birmingham.*

J. B. G.

SCAPPATICCI *v.* ATTORNEY-GENERAL.

1954
Dec. 13.
Willmer J.

Legitimacy—Evidence—Admissibility—Question of domicile—Statements made by petitioner's deceased father—Legitimacy Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 1 (1).

When the domicile of a deceased person is relevant to the issues raised in legitimacy proceedings, evidence is admissible of statements made by the deceased of his domiciliary intentions.

In the Matter of Arthur Henry Davy [1935] P. 1; sub nom. *Davy* v. *Attorney-General,* 50 T.L.R. 588 and *Battle* v. *Attorney-General* [1949] P. 358 applied.

The deceased father of the petitioner in a legitimacy suit was resident in London at the date of his marriage to the petitioner's mother. The deceased had, however, an Italian domicile of origin, and the question accordingly arose whether at the time of the marriage the father had acquired a domicile of choice in England. It was sought to adduce evidence of statements made by the deceased father as to his domiciliary intentions:—

Held, that as the state of mind of the deceased at the material time was the crucial question, the normal rules of evidence should be relaxed and the evidence admitted.

1954

Scappaticci v. Attorney-General.

Petition for declaration of legitimacy under the Matrimonial Causes Act, 1950, s. 17 (2).

The father of the petitioner Gaetano Scappaticci, came to England from Italy in 1900 and continued to live and work in London until 1910, apart from some holidays which he spent in Italy. The birth of the petitioner on July 18, 1910, was registered in the sub-district of Shoreditch North-West on July 26, 1910. His name was entered as John Antonio and that of his mother, who did not sign the register but made her mark, as Mary Cabella.

On October 22, 1910, a marriage celebrated between Gaetano Scappaticci and Maria Cabrelli at St. Peter's Italian church in the district of Holborn was registered; the wife made her mark at the foot of the entry.

In 1910 or 1911 Gaetano Scappaticci returned to Italy with his wife and child, the petitioner, and died on June 2, 1950, never having returned to England apart from one brief holiday in 1949.

By his petition dated April 10, 1952, the petitioner alleged: "3. That the petitioner is the natural child of Maria Scappaticci "who at the time of his said birth was Maria Cabrelli, spinster, "and who, in the . . . birth certificate is described as Mary "Cabella and of Gaetano Scappaticci, a bachelor. That neither "the said Maria Cabrelli nor the said Gaetano Scappaticci was "lawfully married at the date of the birth of the petitioner.

"4. That the said Maria Cabrelli and the said Gaetano Scappaticci were lawfully married on October 22, 1910, at St. Peter's "Italian Church in the district of Holborn in the county of "London.

"5. That the said Gaetano Scappaticci was at the date of "the said marriage domiciled in England.

"6. That in the alternative at that date the said Gaetano "Scappaticci was domiciled in Italy and that by the law of Italy "an illegitimate person is legitimated by the subsequent "marriage of his parents. . . .

"8. That the said Maria Scappaticci died on November 12, "1936, and the said Gaetano Scappaticci died on June 2, 1950.

"The petitioner therefore prays that the court will decree and "declare (1) that the said Gaetano Scappaticci and the said "Maria Scappaticci were lawfully married on October 22, 1910, ". . . (2) that by the said marriage the petitioner became "legitimated as from January 1, 1927, for the purposes of the "Legitimacy Act, 1926. . . ."

On September 15, 1952, an appearance was entered on behalf of the Attorney-General. The petition was served on the brother and sisters of Gaetano Scappaticci, all resident in Italy, by order of Mr. Registrar Pereira, dated October 2, 1952.

The petitioner abandoned his claim under paragraph 6 of the petition but proceeded on the claim under paragraph 8.

The question was raised whether evidence of statements made by the deceased's father as to his domiciliary intentions was admissible.

Colin Duncan for the Attorney-General. Although there is no express authority upon the matter, *In the Matter of Arthur Henry Davy* [1] and *Battle* v. *Attorney-General* [2] provide authority for the admission of evidence which would otherwise be hearsay on the question of paternity. I do not object to the evidence in question being tendered, but submit to the judgment of the court.

H. E. L. McCreery for the petitioner. The issue of domicile in this case is ancillary to the question of establishing legitimacy, and the question whether or no the petitioner's father had acquired a domicile of choice in the country involves a consideration of his state of mind at the relevant time.

[WILLMER J. Prima facie my inclination is to say that the evidence is admissible. There cannot be any better evidence than what the father may have said from time to time.]

If the father was alive he would clearly be able to give evidence as to his state of mind. As he is dead, the best, and indeed the only evidence as to what was his state of mind must be what he said. [*In the Matter of Arthur Henry Davy* [3] and *Battle* v. *Attorney-General* [4] were referred to.] It is submitted that those cases are authority for the proposition that one of the bases for the admission of evidence of this nature in legitimacy cases is that it would be a matter of injustice if it were excluded.

[WILLMER J. What is the answer to the question: How else is the petitioner to prove a domicile of choice of his deceased father?]

Duncan. The difficulties placed in the way of a petitioner who seeks a declaration of legitimacy after the death of a parent only become apparent when the question of the domicile of the parent arises. I have made some effort to discover whether this

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[1] [1935] P. 1; 50 T.L.R. 588.

[2] [1949] P. 358.

[3] [1935] P. 1, 1–4, 15.

[4] [1949] P. 358, 358–9, 360–1.

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point has been before the court before on the question of admissibility of evidence, and I have failed to discover such a case. What I would submit is this: we should welcome its admission, because it is obviously desirable that any evidence that can assist a court to arrive at a conclusion should be before the court; and it is not desirable to exclude it on technical grounds solely, but only if there are other solid grounds denying its reception. In any case where a question of pedigree arises, as it does in a legitimacy case, the Attorney-General welcomes the reception of statements made by persons who are related in any way to the person seeking to establish his legitimacy. But it is right to draw attention to the fact that these are described as exceptions to the general rule, and have been limited to declarations bearing on the express question: Was X the father of Y, or not?—such as recognition, or statements made about "my lads," which was a reference made in *In the Matter of Arthur Henry Davy.*[5] The question must be this: By what evidence is a domicile of choice, which is being alleged, proved? As I understand the old authorities, they unite in saying that the least satisfactory evidence is the statement of the man himself; but it is fair to say that that means when he is a party to the suit.

[WILLMER J. It is his intention that matters.]

His intention is the sole thing that matters, subject to the factum of being in the country; but his evidence is a different matter. That is why I do not object to this evidence, because it does not fall into the same class. But it would not be right to say, if somebody seeks to establish that their father or grandfather has acquired, or did acquire, a domicile of choice in a new country: what other means could they have of proving it other than by what he said? That in a large number of cases would be insufficient. One way would be by proving the length of time he remained in the country; another, what his property was in the country which he is alleged to have adopted; and another, by examining the extent to which he had severed the connexion he had with the country from which he had sprung.

[WILLMER J. All that would have to be done, in any case. But does it not remain true that the best evidence of a man's intention is what he says? I agree with you that what he says when he has a personal interest is a different matter.]

Subject always to the question of weight or credibility, which is a different matter, if the court can have the statements of a man who is now dead, made at a time when

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[5] [1935] P. 1, 3.

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SCAPPATICCI *v.* ATTORNEY-GENERAL.

he had no axe to grind, as to what his intentions were, that would be the best evidence, if there was no reason to suspect that it was evidence of suspicion. Again, those are grounds why we are anxious that your Lordship should see your way to receive this evidence. But I think it is right to tell your Lordship that it is not exactly covered by authority, so far as I am aware. At the moment I am not sure upon what principle your Lordship is able to receive it, except on the rather all-embracing one of: "I do not think that I can do justice in the matter unless I do." There are certain difficulties about it which I thought that I should bring to your Lordship's attention, but I do not object to it at all. I think that it must be characterized as hearsay.

[WILLMER J. In a sense, it is hearsay, because it is evidence of what somebody else said. On the other hand, it is directed to what is, after all, a crucial question in the case: what was the state of mind of the deceased person? It is analogous to the sort of questions which arise in probate cases, as to the intention of the testator.]

WILLMER J. Rightly or wrongly, I propose to admit the evidence, and I think that I have sufficiently indicated my reasons already. I can summarize them in two sentences. It seems to me that on a matter such as domicile, where the state of mind of the deceased person is the crucial question, that which he may have said in his lifetime is certainly excellent evidence, if not the best evidence, as to what his state of mind was. There is authority in the cases which have been cited to me—not, it is true, direct authority for the admissibility of this particular type of evidence—for a relaxation of the rules relating to hearsay in cases of this character. I think, as this question has now arisen in relation to an issue of domicile, that the relaxation of the rule allowed in *In the Matter of Arthur Henry Davy*[1] and in *Battle* v. *Attorney-General*[2] ought to be extended sufficiently far to enable this evidence to be received.

[After a consideration of the evidence as a whole, his Lordship held that the acquisition of an English domicile of choice at the material time had not been established, and dismissed the petition.]

Evidence admitted.

Solicitors: *Cunliffe & Airy; Treasury Solicitor.*

J. B. G.

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[1] [1935] P. 1.

[2] [1949] P. 358.

1955
Jan. 27.

Willmer J.

WESTERN STEAMSHIP CO. LD. *v.* N. V. KONINKLIJKE ROTTERDAMSCHE LLOYD AND OTHERS.

THE EMPIRE JAMAICA.

Shipping—Limitation of liability—Fault or privity—Vessel manned with insufficient number of certificated officers—Collision occurring during watch of uncertificated officer—Actual fault or privity of owners—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503 *—Hong Kong Merchant Shipping Ordinance, No.* 2 *of* 1949.
Causation.

The plaintiffs' vessel, the *Empire Jamaica*, came into collision with the first defendants' vessel, the *Garoet*, owing to the negligent navigation of the officer in charge of the bridge of the *Empire Jamaica*. He was a competent officer with quite a considerable experience as a watch-keeping officer, but was uncertificated, and the vessel, to the knowledge of the plaintiffs, was manned with an insufficient number of certificated officers, in contravention of section 4 (3) (*c*) of the Hong Kong Merchant Shipping Ordinance, 1949:—

Held, that having regard to the evidence of the officer's competence the plaintiffs could not be held guilty of fault or privity in relation to the improper navigation of their vessel within the meaning of section 503 (1) of the Merchant Shipping Act, 1894, and accordingly were entitled to limit their liability, notwithstanding the fact that the vessel was manned with an insufficient number of certificated officers in breach of the Hong Kong Merchant Shipping Ordinance, 1949, and the officer in charge of the bridge was not certificated, since it was impossible to say that there was any causal connexion between the fact of the officer not having a certificate and his improper navigation which led to the collision.

ACTION for limitation of liability.

The plaintiffs, the owners of the *Empire Jamaica*, sought a decree of limitation of liability in respect of damage arising out of a collision which occurred on September 1, 1951, in the Java Sea, between their vessel and the first-named defendants' vessel *Garoet*. The first-named defendants denied that the plaintiffs were entitled to a decree on the ground that they had failed to prove that the collision and consequent damage occurred without their actual fault or privity. The defendants contended that the plaintiffs had failed to discharge the onus of proof in that they had neglected to supply their vessel with a sufficient number of certificated officers in accordance with the Hong Kong Merchant Shipping Ordinance, No. 2 of 1949, rendering their vessel unseaworthy.

K. S. Carpmael Q.C. and *J. B. Hewson* for the plaintiffs. The burden of proof is on the plaintiffs to satisfy the court that they are entitled to a decree of limitation. No plea is raised as to incompetence of Sinon, who was in charge of the bridge, nor is there any evidence to that effect. The defendants allege in effect that the vessel was unseaworthy by reason of non-compliance with the Hong Kong Merchant Shipping Ordinance, No. 2 of 1949.

There is no authority directly in point. A similar question arose in *The Charles Livingston*,[1] but that case was decided on other grounds. Breach of a statutory or an absolute duty is relevant when considering liability; but when dealing with the question of fault or privity it is irrelevant what type of duty is owed: *The Truculent*,[2] *per* Willmer J., and *Beauchamp* v. *Turrell*,[3] *per* Sellers J. In deciding the question of fault or privity each case must be decided on its own particular facts, as in *The Warkworth*,[4] a case of defective equipment, and as *The Charles Livingston*[5] would have been decided if it had turned on the question of competency of the master. Non-compliance with a statutory duty does not of itself preclude a right to limit liability, and any breach of duty not contributing to the collision must be disregarded: *The Truculent*.[6] Many collisions are caused by the actions or inactions of certificated officers. Merely to say that the officer in charge of the watch was uncertificated carries the matter no further.

It is conceded that Leung Yew, the managing director of the plaintiff company, was in the position of being the alter ego of the plaintiff company, and that he was privy to the employment of an uncertificated officer. *The Fanny*[7] is a case in respect of the incompetence of a shore superintendent, but that case deals with de facto incompetence and not the question of certificated competency.

[WILLMER J. What is the policy of the Merchant Shipping Act with reference to the sections dealing with the number of certificated officers to be carried by a vessel?]

Admittedly the intention is to ensure that a vessel is supplied with competent officers, but even certificated officers commit breaches of the Collision Regulations.

R. F. Hayward Q.C. and *Derek H. Ilene* for the first-named defendants. The onus is on the plaintiffs to show that the collision occurred without their actual fault or privity. The defendants' case is that the vessel was unseaworthy arising from undermanning or defective manning, resulting in there being a man in charge of the watch who had neither a certificate nor a temporary permit.

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[1] (1941) 69 Ll.L.Rep. 180.

[2] [1952] P. 1, 17; [1951] 2 T.L.R. 895, 902; [1951] 2 All E.R. 968, 977.

[3] [1952] 2 Q.B. 207, 212; [1952] 1 T.L.R. 695, 697; [1951] 1 All E.R. 719, 722.

[4] (1884) 9 P.D. 145.

[5] 69 Ll.L.Rep. 180.

[6] [1952] P. 1.

[7] (1911) 27 T.L.R. 568; 28 T.L.R. 217.

[WILLMER J. What is the policy of the Merchant Shipping Act as regards vessels having to carry a certain number of certificated officers? A collision may often take place during the watch of an uncertificated third officer.]

The policy is to ensure that there is a sufficient number of certificated officers carried, so that without overwork there may be a certificated man in charge of the watch. In the eyes of the law a person without a certificate is not competent, and it is irrelevant what the owners say. There are no authorities directly in point on the question of unseaworthiness arising from undermanning or lack of certificated officers, but the defendants' contention is supported by the insurance cases: *Clifford* v. *Hunter*[8] and *Farmer* v. *Legg*.[9] Where a vessel is unseaworthy the burden cast on the shipowner to bring himself within the relevant section of the Merchant Shipping Act is a heavy one: *Standard Oil Co. of New York* v. *Clan Line Steamers Ld.*,[10] *per* Viscount Haldane. The owners were at fault and privy to this collision within the meaning of those words, as defined by Buckley L.J. in *Asiatic Petroleum Co. Ld.* v. *Lennard's Carrying Co. Ld.*[11] They were privy to the employing of an uncertificated man and to that man being in charge of a watch. The officer of the watch broke the relevant Collision Regulations, and the master admitted that if he had been on the bridge the collision would not have occurred.

It is submitted that the owners' failure to supply a certificated officer comes within the words of Sellers J. in *Beauchamp* v. *Turrell*,[12] and that that breach contributed to the damage occasioned by the collision and was a breach of a person whose fault defeats the plaintiffs' right to limit. The plaintiffs have failed to discharge the burden of proof.

K. S. Carpmael Q.C. replied.

WILLMER J. In this case the plaintiffs, the owners of a steamship, which, at the material time, was called the *Empire*

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[8] (1827) 3 Car. & P. 16.

[9] (1797) 7 T.R. 186.

[10] [1924] A.C. 100, 112; 40 T.L.R. 148, 150.

[11] [1914] 1 K.B. 419, 432.

[12] [1952] 2 Q.B. 207, 212.

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THE EMPIRE JAMAICA.

Willmer J.

Jamaica but has now been renamed the *Westway*, claim a declaration limiting their liability in respect of damage occasioned by a collision between their vessel and the Dutch motorship *Garoet* which occurred in the Java Sea on September 1, 1951. That collision was the subject of an action commenced in this court—an action, however, which never came to trial because the present plaintiffs, quite properly in view of the circumstances which I have heard described in evidence, admitted their liability. The question that now arises is whether they are to be held liable in full, or whether they have satisfied me that they come within the relevant terms of the Merchant Shipping Act, 1894,[1] whereby the right of limitation is conferred.

The defendants deny that the plaintiffs are entitled to a declaration limiting their liability, on the ground that it is not proved that the collision and consequent damage happened without their actual fault or privity. The particular fault of which the plaintiffs are accused is that they did not provide their ship with a sufficient number of certificated officers in accordance with the terms of the Hong Kong Merchant Shipping Ordinance, No. 2 of 1949. It is alleged by the defendants that that failure on the part of the plaintiffs to supply their ship with the requisite number of certificated officers rendered the ship unseaworthy, in a respect to which the owners were privy, and I am invited to infer that that unseaworthiness was the cause of the collision.

The facts are that the plaintiffs' vessel, which is a fairly large vessel, being of some 3,538 tons gross, carried a certificated master, a certificated chief officer, and two other officers who were not certificated. The collision happened during the watch of one of the uncertificated officers, a man named Sinon, who was signed on under the title of "chief boatswain," but who, although not so called, was regarded and treated as acting second officer. There was also an uncertificated third officer who had been signed on.

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[1] Merchant Shipping Act, 1894, s. 503 (1): "The owners of a ship, "British or foreign, shall not, where "all or any of the following occurr-"ences take place without their actual "fault or privity; (that is to say,)— ". . . (*b*) Where any damage or loss "is caused to any goods, merchandise, "or other things whatsoever on board "the ship; . . . (*d*) Where any loss "or damage is caused to any other "vessel, or to any goods, merchan-"dise, or other things whatsoever on "board any other vessel, by reason "of the improper navigation of the "ship; be liable to damages beyond "the following amounts; (that is to "say,) . . . (ii) in respect of loss of, "or damage to, vessels, goods, mer-"chandise, or other things, whether "there be in addition loss or life or "personal injury or not, an aggregate "amount not exceeding eight pounds "for each ton of their ship's tonnage."

The provisions of the Hong Kong Ordinance to which I have referred are similar to those of the English Merchant Shipping Act, 1894, and the particular provisions which are material to this case are contained in section 4 (3), which provides: "Every "British ship . . . shall, when leaving any port of the Colony, "be provided with officers who possess certificates of competency "of a grade appropriate to their stations in the ship or of a higher "grade, according to the following scale:—(*a*) in any case, with "a duly certificated master; (*b*) if the ship is of one hundred tons "or upwards, with at least one officer besides the master holding "a certificate not lower than that of only mate, or of second "mate in the case of a sailing ship of not more than 200 "tons"; and "(*c*) if the ship carries more than one mate, with "at least the first and second mates duly certificated." This ship de facto carried three mates. I say "de facto" because, although Sinon is not so called, I am satisfied that she carried these three men to perform the duties of mates, and that they were in fact employed and paid as such. In those circumstances, it is clear that section 4 (3) (*c*) was violated.

I have had evidence not only from the master of the ship, who came here to give oral evidence, but I have also had evidence in the form of affidavits from one Leung Yew, the managing director of the plaintiff company, from Sinon, who was the officer concerned and to whom I have already referred, and from one James Jolly, who was the Director of Marine at Hong Kong, and as such the official charged with responsibility for supervising the opening of articles. The evidence contained in the affidavits makes it clear that at the material time, in that part of the world at any rate, there was a shortage of certificated officers; indeed, special provision was made in the local legislation whereby, subject to certain safeguards, a particular ship could be exempted by order of the Governor from the requirement to carry a particular number of officers. I need not go into details about it beyond saying this, that since this casualty occurred this particular ship has in fact been exempted, by order of the Governor, from the obligation to carry a second certificated officer. It is equally clear, however, that at the time of the casualty this ship had not been so exempted.

Jolly in his affidavit says that he was under the impression (which, as we now know, was an erroneous impression) that this ship had already been so exempted at the time of this casualty. It was because of that impression that he assented to the articles being opened in their present form, providing for the engagement of a non-certificated second officer, and raised no objection to the clearance of the ship.

The affidavit of Leung Yew makes it clear that he, as managing director, was perfectly well aware of the facts relating to Sinon, the officer concerned. It is conceded by Mr. Carpmael, on behalf of the plaintiffs, that the position in the company of Leung Yew is such that he is to be regarded as the alter ego of the company, so that his privity, if he were privy, would be sufficient to defeat the right of the company to limit their liability.

In those circumstances, I entertain no doubt that this ship put to sea in breach of the requirements of the Hong Kong Merchant Shipping Ordinance, No. 2 of 1949; and the conclusion seems to me to be inescapable that she did so with the privity of Leung Yew, and, therefore, with the privity of the plaintiff owners.

If that had been the only question I had to decide, the case would, I think, be quite easy of determination. It may very well be that for this breach of the specific requirement of the Hong Kong Ordinance, the master and, I suppose, the owners, could be subjected to criminal proceedings. But I am not concerned with the penal consequences of this breach of the relevant government legislation. What I am concerned with is the question whether the plaintiffs have satisfied me that the collision and the consequent damage happened without their fault or privity. This involves the question whether they have satisfied me that this breach on their part of the Hong Kong Ordinance had no causal connexion with the collision. That it was a cause, in the sense of it being a causa sine qua non, there can be no doubt, because we know that Sinon, the uncertificated officer, was in fact the officer of the watch at the time when the collision happened, and the officer in respect of whose negligent navigation the plaintiffs have already admitted their liability. But that, to my mind, does not conclude the matter. The plaintiffs have given evidence, both in the affidavit of their managing director and in the oral evidence of the master, that Sinon, although uncertificated, was a perfectly competent man, with quite a sound knowledge of navigation, with a long experience at sea, and with quite a considerable experience of watch-keeping as an officer. That evidence has not been contradicted; indeed, on the pleadings, no issue is raised as to the competence of Sinon. The only matter relied on by the defendants is the fact that Sinon had not a certificate. He is, however, still serving in the same ship and in the same capacity. He has, in fact, been serving with these owners for a great number of years. This ship, with Sinon still serving in the same capacity, has now been exempted by order of the Governor from complying with the strict requirements of the Ordinance. From that I infer that Sinon must have satisfied the Director of Marine that he was sufficiently competent to perform his duties notwithstanding the fact that he holds no certificate.

In those circumstances, it is argued by Mr. Carpmael that the mere fact of the officer of the watch not possessing a certificate does not by any means necessarily involve that that was a cause of the collision. I think that Mr. Carpmael might have pressed his argument even further, because, even if the Ordinance is strictly complied with, there cannot ever be any guarantee that the officer in charge on the bridge at any given time will be a certificated officer. Neither the Hong Kong Ordinance nor our own Merchant Shipping Act lays it down that a certificated officer must always have charge of the bridge. It is no offence to have somebody not certificated in charge of the bridge. On the contrary, many of the smaller ships plying in the coastal trade, as is well known, carry no certificated persons at all and are not required to do so. There have been many cases that have come to my knowledge in proceedings in this court where not even the master has been the possessor of any certificate. Clearly, therefore, although the possession of a certificate is cogent evidence of the competence of an officer, it is not the beginning and end of the matter, or by any means the only evidence of an officer's competence. In this case the evidence as to the competence of Sinon is all one way. Having regard to that evidence, it appears to me to be quite impossible to say that there was any causal connexion between the fact of his not having a certificate and the fact of his negligent navigation which led to this collision. I might remark in passing, as was pointed out by Mr. Carpmael, that the possession of a certificate by no means prevents the happening of collisions.

In the circumstances, it seems to me that, on the facts of this case, the plaintiffs have satisfied me that, having supplied the ship with an officer whose competence (apart from his having no certificate) is not otherwise challenged, they cannot be held to be guilty of fault or privity in relation to this collision, notwithstanding the fact that the particular officer who was on duty on the bridge at the time of the collision, and whose negligence brought it about, was not the possessor of a certificate.

I only desire to add this in deference to the arguments of counsel. I have had cited to me a number of authorities, but I do not think that any of them takes the case any further. So far as I know, this is the first case in which the question has been directly raised, whether the non-provision of the requisite number of certificated officers is of itself enough to render an owner guilty of fault or privity in relation to a casualty subsequently occurring. It seems to me, at any rate in the absence of any authority directly in point, that that is necessarily a question of fact in each case. For the reasons which I have given, on the facts of this case, I decide that question in favour of the plaintiffs. In my judgment they are entitled to the declaration sought.

Claim allowed.

Solicitors: *Hill, Dickinson & Co.; Waltons & Co.*

A. S.-R.

In re WIPPERMAN, DECD. WISSLER *v.* WIPPERMAN AND OTHERS.

1953
Feb. 9, 10, 11, 12, 13, 16, 17, 18, 20, 24, 25, 26, 27; *Mar.* 2, 3.

Pearce J.

Probate—Lost will—Burden of proof—Evidence taken before an examiner—Examiner's report—R.S.C., Ord. 37, *r.* 17.

The standard of proof required where a lost will is being propounded is the ordinary standard of proof in civil cases, namely, a reasonable balance of probabilities.

Dictum of Lord Herschell L.C. in *Woodward* v. *Goulstone* (1886) 11 App.Cas. 469, 475, distinguished.

Sugden v. *Lord St. Leonards* (1876) 1 P.D. 154 followed.

The right of an examiner to report is intended to give him an opportunity of recording facts; it is not proper for him to give his opinion of the credibility of the witness.

PROBATE ACTION.

The deceased, Walter Wipperman, died on March 5, 1943, in Germany, where he was detained in the Eichberg Asylum. He left estate in England valued at £250,000 and consisting of 36 bars of gold. If he died intestate his estate was divisible equally amongst his four brothers and sisters. One sister was the plaintiff, who resided in Switzerland and was not a German national. The other three persons entitled on intestacy were

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[Reported by K. B. CAMPBELL, Esq., Barrister-at-Law.]

1953

WIPPERMAN, DECD., *In re.* WISSLER *v.* WIPPERMAN.

German nationals and the Custodian of Enemy Property was entitled to their shares in the estate.

The plaintiff alleged that the deceased's last will was contained in letters alleged to have been written by the deceased to his German lawyer in 1941 or 1942, and that by such will he bequeathed the whole of his estate to her. If that claim succeeded it would follow that the Custodian of Enemy Property for England and the Administrator of German Enemy Property, who were the only defendants who contested the action, would have no claim to the estate.

The plaintiff further alleged that the said will, as contained in the letters, was never revoked by the deceased but was not now forthcoming because the letters had disappeared when the offices of the German lawyer had been destroyed during an air attack on January 16, 1945.

By their defence and counterclaim the Custodian of Enemy Property for England and the Administrator of German Enemy Property did not admit that the deceased wrote the letters, or, if he did write them, that they contained the words alleged by the plaintiff, and further did not admit that the letters, if written, constituted the last will of the deceased. They further alleged that the deceased lacked the necessary testamentary capacity at the time when the letters were said to have been written. By way of counterclaim the defendants propounded a will which the deceased had made in proper form in 1936 leaving all his estate to his mother who had, however, predeceased him in July, 1941. Thus, if the 1936 will were pronounced for the result would be an intestacy, and the defendants further claimed that the deceased's next-of-kin were at all material times German enemy subjects, resident in Germany, and that their rights and interests in the deceased's personal estate became vested in the Administrator of German Enemy Property.

J. E. S. Simon Q.C. and *W. T. Wells* for the plaintiff. Looking at the probabilities of the case one can hardly doubt that the deceased would have wished to make a will in the plaintiff's favour. As he was a man of perspicacity, one can hardly doubt that he did in fact do so. The German lawyer was the man to whom the deceased would naturally have expressed the will. The lawyer, an impressive and honest witness, testifies that the will was written. There was therefore reliable evidence that the deceased did what one would expect him to do, and the court should feel no doubt in pronouncing for the will.

W. A. L. Raeburn Q.C. and *Victor Russell* for the defendants. The probability that the deceased would have wanted to leave all his money to the plaintiff is not so cogent. As his mother was dead, he may well have not cared very much who got it. The circumstances make it extremely doubtful if in fact he did make a will. The subsequent history of the case is far more consistent with that of a family who all believed that the deceased had died intestate and who never thought of a will in the plaintiff's favour until it became apparent that the plaintiff was the only person in whose hands the deceased's money could escape the hands of the administrator. Thereafter one sees the will being wished into existence in a natural desire to save from alien hands the gold which the deceased had died in trying to preserve. The German lawyer is neither impressive nor reliable. The burden which rests on a person who seeks to propound a lost will is greater than the burden in ordinary civil cases: see the dictum of Lord Herschell L.C. in *Woodward* v. *Goulstone*.[1]

PEARCE J. This is a probate action concerning the English assets of a wealthy German industrialist who died unmarried on March 5, 1943, at the age of 55. He was then under detention as a person of unsound mind in an asylum at Eichberg in Germany. The English assets consist of 36 bars of gold deposited in 1939 with the Westminster Bank in defiance of German finance regulations. They are now worth about £250,000. There are further foreign assets of the testator, namely, gold bars worth about £250,000 deposited through a Swiss bank with a bank in Holland, and Canadian Pacific Railway stock worth about £100,000 deposited with an American bank through a Swiss bank. These other assets are not affected directly by this case, but I am told that it may have an indirect effect on them. The testator at one time had some other gold bars worth about £250,000 which were also deposited in Holland through a Swiss bank, but they were discovered by the Germans during their occupation and have disappeared.

The plaintiff, who is a sister of the testator, seeks to prove an alleged will of 1942 whereby he left everything to her. That will is said to have been contained in one sentence in each of two letters sent by the testator from the German prison in Frankfurt, where he was awaiting trial, to the German lawyer who was defending him. The lawyer has been referred to throughout the trial as Dr. X. Owing to the facts, which were told to me in camera, it appears that publication of his name might cause serious danger to him. He gave evidence for the plaintiff on commission in Germany. His office and documents were destroyed in an air raid at the end of the war, and the plaintiff, therefore, has to rely on oral evidence. The wording of the sentence is said to have been either: "My sister Else Wissler is to be my "sole heiress in the event of my dying before regaining my free-"dom," or: "My sister Else Wissler is to be my sole heiress in "the event that I do not come alive out of prison." They are said to have occurred quite unconnected with their context in long letters dealing with matters connected with the charges against the testator.

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[1] (1886) 11 App.Cas. 469, 475.

The father of the testator was Wilhelm Wippermann, who started in a small way and built up a large business at Hagen in the manufacture of bicycles and spare parts for motor-cars. He died in 1929 leaving a widow, Laura, and five children, of whom the testator was the third child. The plaintiff was the second child, and the other children were Wilhelm, Erich and Herta. Wilhelm and Herta are defendants in this case. Erich died just before the case started, and his personal representatives have been made defendants.

If the plaintiff fails to prove the alleged will, the property would fall to be shared equally between the brothers and sisters. For there is no doubt that the testator made an earlier will in proper form in Holland on April 11, 1936, leaving everything to his mother. On July 14, 1941, she predeceased him. His property would, therefore, be divided as on an intestacy.

At the date of the testator's death in 1943 Wilhelm, Erich and Herta were, and still are, German nationals living in Germany. By the German Enemy Property Vesting Order the Administrator of German Enemy Property has a right to so much of the gold as belongs to Wilhelm, Erich and Herta. The plaintiff, however, though a German national, has for the most part been resident in Switzerland, being the widow of a Swiss subject. If her claim is successful, the administrator would (as it seemed at all events when this trial started) have no claim to the assets of the testator.

The Custodian of Enemy Property and the administrator have, therefore, been joined as defendants. It is they, and they alone, who have contested the claim. The family defendants, so far from contesting it, have lent their moral support to the plaintiff. How far that attitude arises from confidence in the plaintiff's claim and a generous family spirit, and how far it arises from a mere willingness to give to their sister property that would otherwise go to the British Administrator of German Enemy Property, is a matter which has been keenly debated before me.

The two contesting defendants (to whom I will refer merely as the defendants) put the plaintiff to proof of the execution, validity and effect of the alleged will. They further say that the testator was incapable of making a will owing to unsoundness of mind. Various issues arise involving considerations of domicile and of German and Dutch law, and on these depend the answer to the question whether the alleged will, if made, was valid. The counterclaim asks me to pronounce for the will of April 11, 1936, in favour of the testator's mother, under which the plaintiff will get only one-quarter, and the administrator will be able to enforce his rights to three-quarters of the estate.

In October, 1933, the testator was arrested on a currency charge. The family lawyer at Hagen got him out of prison after a few days, but as he left the prison he was re-arrested on the charge of having anti-Nazi ideas. He then employed Dr. X to defend him. Dr. X, after a few days, obtained his release on bail. The testator persuaded two so-called tax officials, who were really Gestapo men, that if they would accompany him to the bank at Zurich (which was, in fact, the main centre of his foreign financial operations) he would disclose to them all his foreign assets. How he induced them to believe that it was necessary for him to go to Zurich to make that disclosure is unknown, but he was a very forceful personality, and subsequent events show that when he was in a tight corner he was never hampered by any lack of inventive capacity. When they all arrived at Zurich he denounced the tax officials to the Swiss. The Swiss made the tax officials go back to Germany and the testator remained triumphant in Zurich. At about the same time the plaintiff also went to Zurich with her Swiss husband whom she had just married. The testator did not like her second marriage or her second husband. The testator's mother, who was obviously very fond of him, went to Switzerland and lived with him there. In March, 1934, the testator had to resign from the board of directors of the family company and his brother Wilhelm took his place as chairman.

The testator had no passport, since it had been taken away from him by the Gestapo. In November, 1934, owing to some trouble with the Swiss authorities, he had to leave the country. He then took his mother to live in a house in Nijmegen in Holland. This belonged to a Dutch subsidiary of the German

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company. His shares, and those of his mother, established him in control of the Dutch subsidiary. The plaintiff remained with her Swiss husband in Switzerland, but paid yearly visits to her mother and the testator in Holland. The plaintiff's daughter, according to her own evidence, went to stay more frequently. A Dutch identity card for aliens, renewed approximately every year, shows that he had a right to make certain trips out of Holland, but I see on it no evidence that he did in fact ever do so.

On April 11, 1936, in Holland, the testator made a will leaving everything to his mother. Meanwhile proceedings for economic treason had been going on against him in Germany in his absence. On October 20, 1936, he was convicted and sentenced to four years' imprisonment with hard labour and fined one million marks. His 10 per cent. share in the family company was confiscated and the company had to buy it in. He appealed, without success. On April 19, 1938, he was deprived of his German nationality and he thus became a stateless person living in Holland. As such he was unable, by Nazi laws, to inherit property in Germany.

There is not much evidence of his activities in Holland. Herr Kleine says that he saw the testator about twice before 1939 and advised him to go farther away since he was not safe there, but the mother refused to go farther away. She said that she did not feel well and wished to remain in Holland, and the testator said that he could not go farther away because of his mother. The plaintiff's daughter says that she, her mother and her grandmother all advised the testator to go to the United States of America, but he said that he dared not go without a passport. No dates are given to these conversations, and I doubt if a great deal of weight can be attached to them.

In August, 1939, the plaintiff and her daughter went to live with the testator and his mother, and on September 1, 1939, the plaintiff's Swiss husband died. They were still living there when Holland was invaded in May, 1940. The invasion put the testator in acute peril. He was now once more within the reach of the Nazis. In August, 1940, the plaintiff left Holland and went to Switzerland. On August 18, 1940, the testator was arrested by the Dutch police on the instructions of the Nazis.

At some time in 1940 his sister Herta was arrested in Germany for owning property abroad. She was released on the surrender of her foreign securities and the payment of a large fine. At some date about then Wilhelm also was threatened and surrendered his foreign assets to the authorities. The testator was made of sterner stuff. The Nazis tried hard to get him to declare his foreign assets, but he persistently denied having any. There was another serious danger for the testator in addition to that created by his currency offences. After 1934, while he was safely outside Germany, he had written various letters to the tax officials containing such sarcastic remarks as: "Heil Hitler, the Great "Constantine."

On his arrest in August, 1940, the testator was at first taken to the prison at Kleve for preliminary inquiries. He was then taken to the remand prison at Frankfurt. There he remained while inquiries and interrogations proceeded. In October, 1941, he was transferred to a nerve clinic for observation and investigation into his sanity. In December, 1941, he was taken back to the remand prison at Frankfurt. There he remained until his trial (if one may properly so describe it) on August 24, 1942. After a three days' hearing he was found not to be responsible for his treasonable acts. He was acquitted and ordered to be detained in the mental asylum at Eichberg. There he died on March 5, 1943. It was said that he died of tuberculosis of the intestines, but it seems not improbable that he was done to death. The head of the Eichberg Asylum has since been tried and hanged for the murder of certain other patients there, and his assistant and successor is serving a long sentence of imprisonment.

[His Lordship then considered the evidence before him as to the deceased's testamentary capacity and, after finding that at the time when he was alleged to have written the two letters to his German lawyer he had the necessary capacity to make a valid will, his Lordship continued:] The most difficult part of this case is the question whether the plaintiff has succeeded in establishing the will which she alleges was contained in the letters said to have been written by the deceased to his German lawyer. Mr. Raeburn argues that the plaintiff has a heavier burden of proof in this case than the burden in ordinary civil cases.

In *Woodward* v. *Goulstone* [1] Lord Herschell L.C. said: "Now "I cannot but be alive to the extreme danger of establishing a "will merely by parol evidence of its contents." He then made observations which were relevant rather to the English forms than foreign forms and continued: "I think, therefore, that in order to "support a will propounded, when it is proved by parol evidence "only, that evidence ought to be of extreme cogency, and such "as to satisfy one beyond all reasonable doubt that there is "really before one substantially the testamentary intentions of "the testator."

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[1] (1886) 11 App.Cas. 469, 475.

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No authority other than the dictum of Lord Herschell has been cited to show that the standard of proof required in the reconstruction of a lost will by parol evidence differs from that in other cases. In my opinion, that dictum was not intended to have universal application but only to apply to the facts of that case.

Sugden v. *Lord St. Leonards*[2] seems to suggest no such difference. In my view, the standard of proof in such a case as this is the ordinary standard of proof in civil cases, namely, a reasonable balance of probabilities. But there is a passage in the judgment of Sir George Jessel M.R.,[3] where he is dealing with evidence of a testator's declarations of intention, which should be borne in mind: "Of course, as in the case of pedigree, "the courts must be cautious in admitting such evidence. From "its very nature it is evidence not open to the test of cross-"examination, it is very often produced at second or third hand, "and it is therefore particularly liable to lose something of its "colour in the course of transmission. It is so easily and so "frequently fabricated that all courts which have to dispose of "such cases must be especially on their guard."

[His Lordship then considered matters which are not the subject of this report and continued:] The most important witness for the plaintiff was Dr. X. His evidence was taken before an examiner in Germany, through an interpreter. Mr. Simon puts him forward as an impressive witness. He relies strongly on a special report which, at the request of the plaintiff's solicitors, was made under Ord. 37, r. 17, by the examiner. The defendants' solicitor quite properly did not dissent from that report being made, but did not agree that it was admissible. The report reads as follows: "The witness impressed me as an "absolutely sincere and honest witness who within the limits of "his memory (which he was at pains to point out) was doing "his utmost to give fair and accurate evidence. His occasional "hesitation before answering a question seemed to me to be "accounted for by the difficulty of remembering events which "occurred many years before. When he disagreed with sugges-"tions put to him in cross-examination, his denials were unequi-"vocal and emphatic. His attitude and manner appeared to "me to be wholly consistent with his answer in re-examination "that he had come to give evidence because he was obliged to "co-operate in the search for truth."

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[2] (1876) 1 P.D. 154.

[3] Ibid. 241.

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In my opinion, the right of an examiner to report is intended to give him an opportunity of recording facts (for example, that the witness fainted, or rose to his feet and tried to assault the cross-examining counsel), and it is not proper for an examiner to give his opinion of the credibility of the witness. If laudatory comments are permissible, so too must be damaging criticism. It would then be permissible for an examiner to report: "The "witness appeared to me to be a specious liar." The examiner has no such function. If it were otherwise, the procedure in choosing an examiner would be different. Instead of appointing (as generally happens) examiners who have not a very long or varied experience of litigation, one would insist on appointing some person known to the court as capable of supporting the extremely difficult task of assessing credibility from demeanor. The self-reliant person who has the technique of giving evidence, namely, the power to answer calmly and with poise and proper emphasis, is often, in my view, less reliable than the fumbling, hesitant witness. When the witness speaks in a foreign tongue and the examination occurs in a difficult case, and when there are complicated points with which an examiner can have only a nodding acquaintance, it is impossible for him to express an opinion on which a trial judge ought to rely. I shall therefore disregard the report. This is not, of course, intended as a criticism of the examiner. On examinations, it is more sensible to include rather than to exclude, since the judge can always reject any surplus, as I do now.

[His Lordship then further reviewed the evidence and concluded:] One cannot disregard the whole course of the case and the behaviour of the family during the years after the testator's death—the years before the administrator laid claim to the gold. As one follows the development of the plaintiff's case one asks oneself whether one is beholding the tardy, hesitant and contradictory revelation of real history or the birth and gradual evolution of a myth. On a careful weighing of the probabilities and the evidence, I am not satisfied of the existence of the alleged will and I pronounce against it. [His Lordship then formally pronounced for the 1936 will.]

Solicitors: *Sole, Sawbridge & Co.; Solicitor for the Board of Trade.*

1955
Feb. 25.

Willmer J.

CRESSINGTON COURT (OWNERS) *v.* MARINERO (OWNERS).

THE MARINERO.

Shipping—Collision—Motion to stay proceedings—Lis alibi pendens—Jurisdiction of foreign court founded by arrest of vessel in same ownership—Bank guarantee conditional on foreign court exercising jurisdiction—Subsequent action and arrest of colliding vessel in England—Bank guarantee in English action—Proceedings "Vexa-"tious and contrary to good faith."

Presumption—Rebuttable—Foreign law—Same as English law—Jurisdiction of foreign court. Conflict of Laws—Jurisdiction—Lis alibi pendens.

The plaintiffs' vessel, the *Cressington Court,* was in collision with the defendants' vessel, the *Marinero,* in Argentine waters. The defendants commenced an action in the Argentine Republic and arrested the plaintiffs' vessel. The plaintiffs, wishing to found jurisdiction in Holland, arrested the *Arriero,* a vessel in the same ownership as the *Marinero* and which was in a Dutch port, and commenced an action in that country. To secure the release of the *Arriero,* the defendants gave security conditional on the Dutch court exercising jurisdiction. Later the plaintiffs arrested the *Marinero* in Liverpool and commenced an action in England. A guarantee was furnished for the release of the *Marinero.* In the Dutch action, the defendants pleaded that the Dutch court had no jurisdiction because the collision occurred in Argentine waters.

The defendants moved for an order that the English proceedings be set aside or stayed:—

Held that, there being no evidence as to the validity of the defendants' plea under Dutch law, it must be presumed that the position under Dutch law was the same as that under English law; that, as under English law this plea would be of no avail to the defendants, the plaintiffs had perfectly good security in Holland; that although the security in the Dutch proceedings was obtained by the arrest, not of the colliding vessel but of a vessel in the same ownership, the proceedings in England were vexatious and contrary to good faith; and that in the circumstances these proceedings must be stayed and the defendants relieved from their guarantee.

The Christiansborg (1885) 10 P.D. 141; 1 T.L.R. 634 applied.

The Reinbeck (1889) 6 Asp.M.L.C. 366; 60 L.T. 209 distinguished.

MOTION.

The plaintiffs' vessel, the *Cressington Court*, was in collision with the defendants' vessel, the *Marinero*, in the River Plate on July 27, 1954. The defendants commenced an action in the Argentine Republic on July 29, and arrested the plaintiffs' vessel. The plaintiffs furnished security to obtain the release of their vessel, but at no time put in any counterclaim in the Argentine proceedings. The plaintiffs unsuccessfully attempted to persuade the defendants to consent to either English or Dutch jurisdiction. On October 2, the plaintiffs, to found jurisdiction in Holland, arrested the *Arriero*, a vessel in the same ownership as the *Marinero*, and issued a writ. A bank guarantee conditional on the Dutch court exercising jurisdiction was furnished by the defendants to secure the release of the *Arriero*. Later, and before any further steps had been taken in the Dutch action, the plaintiffs arrested the *Marinero* on November 26 in Liverpool, and commenced an action in the English courts. A further guarantee conditional upon the English court exercising jurisdiction was furnished by the defendants. The guarantee in England was for a lower figure than that of the guarantee in Holland, because the limit of liability of the defendants' vessel under English law was smaller than that under Dutch law. The limit of liability under Dutch law was considerably lower than that under the laws of the Argentine Republic.

The defendants moved for an order that the writ of summons and all further proceedings be set aside; alternatively, that all further proceedings be stayed, and that the guarantee, given in lieu of bail by the defendants, be discharged. The defendants contended that the court should in its discretion stay the proceedings in England, since the plaintiffs, having commenced proceedings in Holland, had a guarantee equivalent to bail in those proceedings, and there were also proceedings at the suit of the defendants pending in the Argentine Republic.

A. A. Mocatta Q.C. and *S. Knox Cunningham* for the defendants. The proceedings in the Argentine Republic are relied on merely as one of the circumstances to be considered by the court, and it is conceded that those proceedings by themselves are not a sufficient ground on which the court would stay the English proceedings. There is no authority directly in point where an action has been commenced abroad by the arrest of a vessel in the same ownership as the tortfeasing vessel, but the staying of proceedings is in the discretion of the court. Once an action has been commenced abroad and bail, or the equivalent of bail, has been furnished in that action, the immunity from arrest of the vessel and her freedom to trade has been purchased, and the court will stay subsequent proceedings here on the grounds that they are vexatious and contrary to good faith: *The Christiansborg*[1];

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[1] (1885) 10 P.D. 141; 1 T.L.R. 634.

The Mannheim[2]; and *The Golaa.*[3] *The Glenluce*[4] and *The Hartlepool*[5] are distinguishable by the fact that the actions were in personam and no question of security arose in the proceedings abroad. *The Christiansborg,*[1] and the authorities following that decision, can be distinguished from the present case only on the ground that in the action abroad the security was furnished as a result of the arrest of a vessel in the same ownership as the tortfeasing vessel; or on the ground that the Dutch court will not exercise jurisdiction and the security obtained is not the equivalent to bail. It is submitted that the same principles apply whether the action abroad is commenced and the security obtained by the arrest of a vessel in the same ownership as the tortfeasing vessel or of the tortfeasing vessel herself. Here the giving of the guarantee in Holland purchased the immunity from arrest and the freedom to trade of the *Marinero.* As to the second ground of distinction, there is no evidence before the court that the Dutch court will not exercise jurisdiction.

J. V. Naisby Q.C. and *P. T. Bucknill* for the plaintiffs. Where a party obtains security in an action abroad and then commences an action in rem in England, the English proceedings are not necessarily vexatious: *The Reinbeck.*[6] All the circumstances must be considered, and it may be that it can be shown that the English proceedings are not vexatious. Except for the Dutch proceedings, the facts of the present case are analogous to those in *The Quo Vadis*[7] and *The Monte Urbasa,*[8] where the court refused to stay the English proceedings. The plaintiffs have a right to bring their action in England, and the fact that they are defendants in an action in the Argentine Republic is no ground for staying these proceedings: *The Janero.*[9] In the circumstances the commencing of an action in England was not vexatious, since if the Dutch court decide not to exercise jurisdiction the plaintiffs will have no security. It is conceded that the defence raised in the Dutch proceedings, that the collision having occurred in Argentine waters, the court has no jurisdiction, would be of no avail to the defendants in an English court. Clearly the English courts have jurisdiction, and the question to be decided is whether by commencing an action in Holland the plaintiffs have deprived themselves of having their case tried in the English courts. The maritime lien attaches to the *Marinero* from the time of the collision until it is extinguished by bail or some other form of security being furnished. There is no authority for the proposition that such a lien is extinguished by security being furnished for the release of a vessel in the same ownership. In all the circumstances the commencing of proceedings in England was not vexatious.

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[1] (1885) 10 P.D. 141.

[2] [1897] P. 13; 13 T.L.R. 56.

[3] [1926] P. 103; 42 T.L.R. 414.

[4] (1929) 34 Ll.L.R. 407.

[5] (1950) 84 Ll.L.R. 145.

[6] (1889) 6 Asp.M.L.C. 366.

[7] [1951] 1 Ll.Rep. 425.

[8] [1953] 1 Ll.Rep. 587.

[9] [1928] P. 55; 44 T.L.R. 193.

A. A. Mocatta Q.C. in reply. It is not contended that the court has no jurisdiction or that the maritime lien is extinguished, but that it would be vexatious for the court to exercise its jurisdiction: *The Christiansborg.*[10] As to the question whether the Dutch court will exercise jurisdiction, where there is insufficient evidence as to the position under foreign law, it must be assumed that the position is the same as that under English law: Dicey's Conflict of Laws, 6th ed., Rule 194, p. 866. *The Reinbeck*[11] is distinguishable from the present case by the fact that bail was there furnished voluntarily.

WILLMER J. By this motion the defendants ask for an order that the writ of summons and all further proceedings be set aside, or alternatively that all further proceedings be stayed. They further ask that in any event the guarantee which has been given on behalf of the defendants in lieu of bail to answer the plaintiffs' claim should be discharged. The grounds on which the motion is put are twofold, at any rate so far as the terms of the notice of motion are concerned. The first ground is that the plaintiffs have already previously commenced proceedings in Holland arising out of the same collision that constitutes the cause of action in this case, and that in the course of those Dutch proceedings they have arrested another ship belonging to the same owners and in return for her release have received a guarantee equivalent to bail. The second ground on which the notice of motion is put—although this was not so much relied upon by counsel for the defendants—is that there are proceedings pending in the Republic of Argentine at the suit of the present defendants; and it is suggested that in those circumstances this court, in its discretion, should stay the present proceedings so as to allow the matters in issue between the parties to be dealt with in the Argentine proceedings.

[His Lordship stated the facts and continued:] From November 26 onwards, accordingly, we have suits proceeding at the suit of the plaintiffs in two different countries, one in Holland and one in England, both arising out of the same collision. It is not unimportant that 12 days after the writ in the present action, namely, on December 8, the plaintiffs took an active step in the prosecution of their Dutch action, in that they then took the step which would be described in this country as delivery of the statement of claim, and on the same day the defendants filed their defence.

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[10] 10 P.D. 141.

[11] 6 Asp.M.L.C. 366.

It is in those circumstances that I am asked, if not to set aside the present writ, at least to stay all proceedings, on the ground that these proceedings are vexatious having regard to the previous proceedings already commenced by the plaintiffs in Holland. I am also invited to take into consideration the action in the Argentine which the defendants have started. But in argument Mr. Mocatta did not press that upon me; he recognized that, standing by itself, it was not likely to be held a sufficient reason for staying the plaintiffs' proceedings here, and he only relied upon it as part of the background of the case, so as to be able to say that there are actually three actions proceeding at the moment in three different countries arising out of the same collision. I think that Mr. Mocatta was right in not attempting to press that secondary point which is advanced by the notice of motion, and I agree with him that by itself the existence of the defendants' suit in the Argentine would not have been a sufficient reason for staying the present proceedings by the plaintiffs. I can, therefore, leave that point and deal with what I conceive to be the real point of this motion, a point which, I confess, is a formidable and important one.

The argument for the defendants is that this case is really on all fours with *The Christiansborg*,[1] which was decided by the Court of Appeal in 1885. It is said that the fact that in the present case it was not the *Marinero*, but a sister ship, the *Arriero*, that was arrested is a distinction without a difference; for in the present case, as in *The Christiansborg*,[1] the effect of what was done in Holland was to purchase the further immunity of the *Marinero* from arrest in respect of this collision. In those circumstances it is said that precisely the same considerations as led the majority of the Court of Appeal in *The Christiansborg*[1] to say that what was there done was vexatious should apply to the facts of the present case.

On the other side, Mr. Naisby pointed out, as is true, that neither *The Christiansborg*[1] nor any subsequent authority dealt with the unusual position arising where the ship arrested in the foreign proceedings is another ship belonging to the same owners, and not the ship which has been in collision and which is sued here. He pressed upon me that the maritime lien attaching at the moment of the collision is a right against the particular ship and, as far as this court is concerned, a right which cannot be extinguished except by the giving of bail to secure the release of the particular ship. Certainly there is no authority for the proposition that the maritime lien attaching to the *Marinero* can be extinguished by the arrest elsewhere of another ship belonging to the same owners. To that argument, however, Mr. Mocatta replies that he is not contending that the maritime lien attaching to the *Marinero* is extinguished; all he is asking me to do is to say that in the circumstances it is vexatious to proceed with what would otherwise have been a perfectly proper action to pursue.

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[1] (1885) 10 P.D. 141.

Mr. Naisby further relies on the fact that the guarantee given by the defendants in the Dutch proceedings was given subject to the condition of the Dutch court exercising jurisdiction. Furthermore, he says that point is added to that by the fact that by their defence in the Dutch proceedings the defendants have expressly pleaded that the Dutch court has no jurisdiction, because the case concerns a collision in Argentine waters, and under the law of Argentine a claim can only be lodged before the Argentine court. Mr. Naisby's argument is that if I were to stay these proceedings it would deprive him of the security which has been obtained in this country, and if thereafter it turned out that the point which the defendants have pleaded in the Dutch proceedings was a good point, then the guarantee given in the Dutch proceedings would equally be of no avail and the plaintiffs would find themselves without any security whatever.

On the face of it I think that the point made by Mr. Naisby, that the guarantee given in the Dutch proceedings is conditional, is an attractive one. But I think that one must examine what the condition is because, as has been stressed over and over again in all the authorities to which I have been referred, one must look at all the circumstances of the case. The point taken by the defendants in the Dutch proceedings, as is agreed by counsel on both sides, is a point which could not possibly have been taken in this country; it is not a defence which would be open to the defendants under English law. Although I have affidavits from Dutch lawyers on both sides, neither of them has expressed any opinion as to the merit of the point taken by the defendants with regard to the jurisdiction of the Dutch court. Indeed, there is no evidence at all before me as to what the Dutch law is. In those circumstances, in spite of Mr. Naisby's protests, I think that I can do no other than follow the ordinary rule and presume that, in the absence of evidence to the contrary, Dutch law is the same as English law. In those circumstances, it immediately appears that the condition attached to the guarantee which was given in the Dutch proceedings is really something quite illusory, and that there is no substance in it. As Mr. Mocatta put it, it is merely an instance of a businessman seeking to protect himself by careful wording of the guarantee to which he puts his signature, and he has reminded me that similar protective wording has been used in connexion with the guarantee given in the proceedings in this country. I do not think, therefore, that the fact of a condition being attached to the giving of the guarantee in the Dutch proceedings, so far as the evidence in this case goes, does anything to deprive the guarantee of its value, or to limit its value in any real way.

The question then arises whether I am to extend what I may call the principle of *The Christiansborg*[2] to a case in which it is not the offending ship, but another ship belonging to the same owners, which has been the subject of arrest in the foreign proceedings. It seems to me that the effect of what was done in Holland in the present case was to purchase the future immunity from arrest of the *Marinero*. It seems to me that the giving of the guarantee in the Dutch proceedings had that effect, just as much as if it had been the *Marinero* herself that had been arrested. I apprehend that if the *Marinero* were to proceed to Holland the Dutch court would refuse to sanction her arrest in respect of the same collision.

The upshot of what has happened is that the plaintiffs have got their security in respect of this collision none the less because they got it by the arrest of another ship rather than the *Marinero*. The decision of the majority of the court in *The Christiansborg*[2] makes it clear that the exact form in which the security is given, and the exact method by which it is extracted, does not matter, provided that the substance of it is that, in order to secure the future immunity of the ship and her future ability to continue trading, the defendants are forced to give security. That, in effect, is what they have been forced to do in the present case. In those circumstances, I think that I ought to follow the course taken by the Court of Appeal in *The Christiansborg.*[3] It seems to me that to continue to harass the defendants by arresting their ship in this country, notwithstanding the provision of security in the Dutch proceedings, is in all the circumstances vexatious and contrary to good faith, just as much as was the action that was taken in *The Christiansborg.*[3]

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[2] 10 P.D. 141.

Mr. Naisby cited another and later decision of the Court of Appeal, namely, *The Reinbeck,*[4] but it seems to me that that case is readily distinguishable both from *The Christiansborg*[3] and from the present case, in that the security that had been provided abroad in that case was provided voluntarily and without the opposite party being in a position to exercise compulsion. In the present case, however, the security obtained by the plaintiffs in the Dutch proceedings was security obtained by compulsion, in the sense that the defendants had to furnish it if they wanted their ship to be released. In *The Reinbeck,*[4] *The Christiansborg*[3] was cited and distinguished, and Bowen L.J. was careful to say[5]: "It may well be that in actions in rem there "may be circumstances which make it an abuse of the process "of the court to proceed with the case, but it is material in each "case to see whether it is in fact an abuse of the process of the "court or contrary to good faith." It is precisely that which I have tried to do in the present case.

On the facts of this case, and bearing in mind that, so far as has been proved before me, the plaintiffs have perfectly good security in Holland, which was the forum to which they chose to go in the first instance, I think that it would be vexatious and an abuse of the process of this court to allow the present proceedings to continue.

The other cases cited by Mr. Naisby can be dismissed summarily, if he will forgive my doing so, by saying that they would have been highly relevant if Mr. Mocatta had taken his stand on the Argentine proceedings. But that point was not seriously argued by Mr. Mocatta, and, as I am not founding any part of my judgment on the existence of the Argentine proceedings, I do not think that it is necessary to deal in detail with those other authorities.

I put my decision on the basis that these proceedings are vexatious and contrary to good faith, having regard to the plaintiffs' own voluntary act in going first to the court in Holland

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[3] 10 P.D. 141.

[4] (1889) 6 Asp.M.L.C. 366.

[5] Ibid. 368.

and there obtaining security by arrest of the sister ship of the *Marinero*. In those circumstances, I think that the defendants are entitled to relief, and the only question is as to the form of the order. In *The Christiansborg* [6] the order made by the Court of Appeal was that the proceedings should be stayed. Notwithstanding that a different order was made by Bateson J. in *The Golaa*,[7] to which I was also referred, I think that the proper order is one staying the proceedings with the additional provision that the defendants are relieved from the guarantee which has been given on their behalf.

Judgment accordingly.

Solicitors: *Ince, Roscoe, Wilson & Griggs; Holman, Fenwick & Willan.*

A. S.-R.

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[6] 10 P.D. 141.

[7] [1926] P. 103.

[MANCHESTER SUMMER ASSIZES.]

1954
July 19.

Lord Merriman P.

BITHELL *v.* BITHELL (BY HER GUARDIAN).

Husband and Wife—Divorce—Insanity—Care and treatment—Voluntary patient—Previous detention following upon admission of wife as temporary patient on application of husband—Visitors' certificate that wife should continue to be detained as temporary patient—Whether detention "in pursuance of order"—Compliance with all safeguards of Mental Treatment Act, 1930 (20 & 21 *Geo.* 5, *c.* 23), *s.* 5—*Matrimonial Causes Act,* 1950 (14 & 15 *Geo.* 6, *c.* 25), *s.* 1 (2) (*a*) and (*d*).

On March 7, 1947, a wife was received into a mental hospital as a temporary patient under section 5 of the Mental Treatment Act, 1930. On March 8, 1947, in compliance with section 5 (9) of the Act, she was visited by two members of the visiting committee, who signed a statement in the minute book in the superintendent's possession that they were satisfied that she should be detained. During the last 28 days of her six months' detention as a temporary patient she was examined by the medical superintendent, who formed the opinion that she had recovered her volition sufficiently to agree to remain as a voluntary patient. Accordingly, on September 6, 1947, she was discharged as a temporary patient and simultaneously

[Reported by JOHN WARD, Esq., Barrister-at-Law.]

admitted as a voluntary patient and remained as such up to the date of her husband's petition in 1953 praying for a divorce on the ground that the wife was incurably of unsound mind and had been "continuously under care and treatment for a period of at least five "years immediately preceding the presentation of the petition," within section 1 of the Matrimonial Causes Act, 1950:—

Held, that from the date of the signed statement by the visitors, on March 8, 1947, she was detained in pursuance of an "order" under the Mental Treatment Act, 1930, within the meaning of section 1 (2) (*a*) of the Matrimonial Causes Act, 1950; and that as the wife had been detained in pursuance thereof for a period immediately preceding her treatment as a voluntary patient within section 1 (2) (*d*) of the Act, the husband was entitled to a decree.

Benson v. *Benson* [1941] P. 90; 57 T.L.R. 578; [1941] 2 All E.R. 335 and *Whitley* v. *Whitley* [1946] 2 All E.R. 726 considered.

PETITION for dissolution of marriage.

By his petition dated August 19, 1953, and amended on August 26, 1953, the husband prayed for a divorce on the ground that his wife was incurably of unsound mind and had been "continuously "under care and treatment for a period of at least five years "immediately preceding the presentation of the petition," within section 1 of the Matrimonial Causes Act, 1950.[1] On March 7, 1947, the wife was received as a temporary patient into the County Mental Hospital, Rainhill, Lancashire, upon the husband's application under section 5 of the Mental Treatment Act, 1930. On March 8, 1947, she was visited by two members of the visiting committee in accordance with section 5 (9). In an entry in the minute book in the possession of the medical superintendent they stated: "We, the undersigned, being two members of the com-"mittee, have today seen the under-mentioned temporary "patients," [of whom one was the wife] "and are satisfied that "they should be detained," and they signed the entry, thus complying with section 5 (10). The wife thereafter continued to be detained as a temporary patient until September 6, 1947. During the last 28 days of the six months' detention as a temporary patient the medical superintendent made an examination of the wife and came to the conclusion that though she was by no means cured, or curable, she had at least regained the capacity of forming and expressing her own volition, and therefore it was inappropriate to apply to the board of control for an extension of her treatment as a temporary patient. Thus, on September 6, 1947, the wife was discharged as a temporary patient and simultaneously admitted as a voluntary patient under the Act of 1930, and she remained a voluntary patient in the hospital up to the date of hearing of the petition.

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[1] Matrimonial Causes Act, 1950, s. 1 (2): ". . . a person of unsound "mind shall be deemed to be under "care and treatment—(*a*) while he is "detained in pursuance of any order ". . . under the Lunacy and Mental "Treatment Acts, 1890 to 1930 . . . "(*d*) while he is receiving treatment "as a voluntary patient under the "Mental Treatment Act, 1930, . . . "being treatment which follows with-"out any interval a period during "which he was detained as mentioned "in paragraph (*a*) . . . of this sub-"section; and not otherwise."

Issue was joined in the answer filed by the guardian ad litem on behalf of the wife.

Lord Merriman P. heard arguments on the question whether detention as a temporary patient for a period not exceeding six months, but after the statutory safeguards had been complied with, was an " order " within the meaning of section 1 (2) of the Matrimonial Causes Act, 1950.

A. M. Knight for the husband.

W. J. Moore for the Official Solicitor as guardian ad litem of the respondent.

LORD MERRIMAN P. This is a husband's petition for divorce on the ground of insanity of his wife, who is represented by the Official Solicitor as guardian ad litem. So far as the facts are concerned, there neither is nor at any time has been any dispute. It is quite clear that on March 7, 1947, the wife was admitted or received into the mental hospital at Rainhill. She was so admitted or received strictly in accordance with the procedure provided by section 5 of the Mental Treatment Act, 1930, which applies to temporary treatment, without certification, of certain persons. The husband made an application or request which was backed by the recommendation of two medical practitioners, as the Act requires, and she was received accordingly. The matter was reported in due course to the board of control.

The Act provides, by various subsections of section 5, several safeguards for the patient. Subsection (11) provides that a patient received as a temporary patient may be detained for a period not exceeding six months, but shall not be detained as such for any longer period. Subsection (12) provides that if a temporary patient becomes capable of expressing himself as willing or unwilling to continue to receive treatment, he shall not thereafter be detained for more than 28 days unless in the meantime he has again become incapable of so expressing himself. Not less important are the following provisions of subsection (13): " Where "it is anticipated that a person who is undergoing treatment as a "temporary patient under this section will not recover within the "period of six months, but his early recovery appears reasonably "probable, that period may from time to time be extended for "further periods of such length not exceeding three months as "may be specified in directions given by the board of "control. . . ."

That situation has already been considered in *Benson* v. *Benson*,[1] which I myself decided in the early days of the "Herbert" Act. In that case the board of control towards the end, but before the actual completion of the period of six months, had given one of the extensions provided by section 5 (13). The point of the decision was that a direction for such an extension was an "order" within the meaning of the Act, upon which it followed that when the status of being a voluntary patient followed immediately thereafter without any interval, the wife had been continuously under care and treatment for the requisite period within the meaning of section 1 (2) (*a*) and (*d*) of the Matrimonial Causes Act, 1950, which merely reproduces in a consolidated form the earlier provisions of section 176A of the Judicature Act. That case expressly left undecided the question whether, short of such a direction by the board of control, there could at any earlier period of the detention as a temporary patient be any question of the patient having been detained under an order. I do not think that it is necessary to refer to the very cursory glance at that aspect of the matter which is contained in my judgment, because it is quite plain that, whatever I may have thought, I was not prepared, as I said in my judgment,[2] to express any opinion about that one way or the other. Nobody, I am assured, up to the present time has doubted the validity of that decision. I do not propose to doubt it myself, but I would like to call attention, for the purpose of record, to two rather careless slips which appear in the report. At p. 95 I referred to the two hospitals concerned, the one into which she was originally admitted and the other in which, after the first period of being a temporary patient, she was admitted as a voluntary patient. The allusion about the middle of the page should have been to the Chester Mental Hospital, where she had been a temporary patient, and not to the Lancaster Hospital in which she became a voluntary patient. Similarly, at the bottom of p. 96 in the beginning of the

[1] [1941] P. 90; 57 T.L.R. 578; [1941] 2 All E.R. 335.

[2] [1941] P. 90, 96.

last paragraph on that page on the fifth line, the word "voluntary" should have been "temporary." Having taken this opportunity of correcting those errors I propose to say no more about *Benson* v. *Benson*.[1]

I have not yet referred to one of the safeguards in section 5 which is of the greatest possible importance. I have described how the temporary patient gains admission to the mental hospital, but the next step is one of very great importance in this case. By section 5 (9): "Within one month of the reception of any "person received as a temporary patient under this section he "shall be visited by at least two members of the visiting com-"mittee of the institution, if he is in an institution which has a "visiting committee,"—that is the present case—"or if he is not "in such an institution by two at least of the visitors of licensed "houses appointed for the district in which he is, of which visitors "one must be a registered medical practitioner. Provided that in "the area within the immediate jurisdiction of the board of "control, the duty imposed by this section on the visitors of "licensed houses shall be performed by the board of control." Subsection (10) provides: "If the persons making the said visits "are of opinion that it is proper that the patient should continue "to be detained they shall sign a statement to that effect and "shall leave it with the person in charge, but if they are of "opinion that it is not proper that he should continue to be "detained, they shall, before the expiration of the second day "after the day of the said visit, send to the board of control a "report stating their said opinion, and the grounds on which it is "based, together with such other observations as they think fit."

Another subsection to which I should call attention is subsection (14), which provides: "The board of control may at any time "order—(i) either that any person received as a temporary patient "shall be discharged; or (ii) that steps shall be taken to deal with "him under the principal Act as a person of unsound mind." That subsection is of importance in connexion, amongst other things, with subsection (9), the proviso to which substitutes the board of control itself in certain areas for the visitors of licensed houses. That is not this case because, as I have already said, this case is one in which there is a visiting committee of the particular institution. But in the case of a licensed house within the immediate control of the board of control the combined effect, of course, of these two subsections would be this: the board of control itself as visitor—that is, its representative sent down to deal with the case as visitor of the particular institution wherever it happened to be—would be obliged to express the opinion that it was or was not proper that the particular patient should continue to be detained. If Yea, all good and well; if Nay, it would manifestly be their duty at once to discharge the patient, which they have the power to do at any time. It is apparent, therefore, on the face of the section itself, that this particular safeguard, whoever the visitors may be in the circumstances of any given case, is an extremely important safeguard from the point of view of a patient who is in the hospital because it is assumed, as section 5 (1) predicates, that though the person is suffering from mental illness and is likely to benefit by temporary treatment, he is for the time being incapable of expressing himself as willing to receive such treatment. In other words, by whatever name one calls it, the affirmative opinion of the visitors, be they the visiting committee of the institution or visitors of licensed houses, or the board of control themselves in the special case mentioned in the proviso, is, in effect, the authority for the continued detention up to the end of the first six months of the temporary patient. On the other hand, if their opinion is that the person ought no longer to be detained, the expression of that opinion is the first step in what presumably will be a discharge order in due course by the board of control, if not by someone else in the meantime. If it is the board of control itself or its representatives who express that opinion, naturally the discharge will be immediate. In other words, it seems to me to be plain that from the moment when the affirmative opinion is expressed by whichever of these bodies happens to be the right one in the particular case, there is at once the sanction of law for the continuation of the detention up to the first six-monthly limit. I think it not without significance that the statute enacts that the visitors are to sign a statement to that effect and leave it with the person in charge, which looks very much like handing him, in some form or another, a written authority to continue to detain the patient.

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[1] [1941] P. 90.

It is quite clear from the perusal of *Benson* v. *Benson* [1] that that particular question never came into issue in that case at all. It does not affect the question one way or the other, but it is also clear that in *Whitley* v. *Whitley* [3] it was overlooked by Barnard J., who tried the case. He came to the conclusion that it was impossible to hold that the original application or request for the reception of a temporary patient by the husband, and the recommendation of the medical practitioners in support of it, amounted to an order; and it is worth looking at the words in which he said so. He said [4]: " As I have already said, I consider it my duty to " construe this Act strictly, and under no stretch of the imagina- " tion can I construe the word ' application ' as ' order,' or the " word 'request ' as ' authority ' "—note the use of the word " authority."—" Undoubtedly, the wife was detained as a tem- " porary patient pursuant to section 5 of the Mental Treatment " Act, 1930, and obviously she was properly detained, but, in my " view, she was not detained in pursuance of any order under the " Lunacy and Mental Treatment Acts, 1890–1930." As it happens, the judge was mistaken in stating, by inadvertence, that obviously she was properly detained. She was not, because this safeguard of the visit by the visitors had not been carried out. The case went to the Court of Appeal, and when this point emerged, as the report [5] shows, the Court of Appeal through the Official Solicitor ascertained that the provisions had not been complied with at all, in that the visiting committee signed no statement to the effect that it was proper that the wife should continue to be detained.

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[1] [1941] P. 90.

[3] [1946] 2 All E.R. 726.

In the present case, I have had the advantage of very clear evidence of the medical superintendent who has satisfied me, on a point about which there has been no controversy at all, that the wife is incurably of unsound mind, and has also satisfied me that on the Friday after this patient was admitted she, in common with two other women patients, was visited by two members of the visiting committee, whom he has satisfied me were two of the visitors within the meaning of the section. In a statement in the appropriate place—the minute book in the superintendent's possession—they stated: " We, the undersigned, being two " members of the committee, have today seen the undermen- " tioned temporary patients,"—one of whom was the wife in this case—" and are satisfied that they should be detained."

It is true that until the end of six months she continued to be detained as a temporary patient. It is equally true that though she is, I am satisfied, incurably of unsound mind, it was not thought right or proper to apply to the board of control for a direction for an extension which, if it had been granted, would, for what it is worth, have been covered directly by the decision in *Benson* v. *Benson*.[6] But the reason why that application was not made was because, when a special inspection was made well within the last 28 days of the six months, the medical superintendent came to the conclusion that the wife had been "relieved" to this extent, that though by no means cured, or curable, she had at least regained the capacity of forming and expressing her own volition and, therefore, it would have been inappropriate, if not impossible, to make an application to the board of control for an extension on the basis that the facts were otherwise. Indeed, in exercise of her own volition, coincidentally with the expiration of the six months' detention as a temporary patient, she became of her own wish and accord a voluntary patient, thereby satisfying the requirements of the Matrimonial Causes Act, s. 1 (2) (*a*) and (*d*), provided always that the detention which immediately preceded her becoming a voluntary patient was detention under an order.

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[4] [1946] 2 All E.R. 726, 730.

[5] [1947] 1 All E.R. 667; 63 T.L.R. 289.

I have expressed my own view that there was plainly an element of authority about the statement signed and recorded in the proper minute book by the visiting committee. In my opinion, although, of course, the question could not arise for decision in the Court of Appeal in *Whitley* v. *Whitley*[7] (because, as I have said, those duties were not carried out at all in compliance with the section), I think that there is a very clear indication of the view which I ought to take about the effect of the proper action taken by the visitors in the present case. After setting out all the points and quoting section 5 (9), (10) and (11), Bucknill L.J., delivering the judgment of the Court of Appeal, said of the last of these subsections[8]: "This subsection clearly indicates "that the statement or report of the visiting committee is "one of the essential requisites for the lawful detention of "the temporary patient for the period of not more than six "months." Finally, after the inquiries which disclosed the failure to comply with the terms of the section, he said[9]: "It is clear "to us that the provisions of the subsections of section 5 to which "we have referred have not been complied with in this case, in "that the visiting committee signed no statement to the effect "that it was proper that the wife should continue to be detained. "We think that the failure to comply with these important pro-"visions, which are intended to safeguard a patient against any

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[6] [1941] P. 90.

[7] [1947] 1 All E.R. 667.

[8] Ibid. 668.

[9] Ibid.

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"possible abuse of the powers given under this Act, itself defeats "the argument that the wife was lawfully detained under an "order made under the Mental Treatment Act, 1930." Consequently, the appeal was dismissed, though, of course, necessarily for different reasons from those given by Barnard J.

It is true that they did not decide that, if the provisions had been properly carried out by the visiting committee, what they did would have amounted to an "order" for the continued detention. Indeed, if they had done so, they would have been deciding something which could not possibly arise as an issue in that case and, as one knows, the Court of Appeal are very careful to refrain from deciding points the decision of which is not called for on the facts of a particular case. Indeed, that observation applies to other courts besides the Court of Appeal. But having said that, I have some difficulty in distinguishing between an act which is an authority for the continued detention of a temporary patient and an act which is an "essential requisite" to the continuation of the lawful detention of the temporary patient or something which can fairly be called an "order" for her detention. Again I am not deciding anything which does not arise in this case, and I am certainly not to be taken to be dissenting from Barnard J.'s decision to the contrary effect as regards an application; but, in my opinion, from the moment when in this case the visitors said and certified that they were satisfied that the wife should continue to be detained, she was detained under an order and as that statement was efficacious, not indeed from March 7 (because they did not go there until March 8) but from March 8, on which day it was signed and recorded in the book, until September 6, when the six-months' period elapsed and the wife of her own volition became a voluntary patient, she was detained under an order within the meaning of the Act. That being so, with very considerable indebtedness to Mr. Knight and Mr. Moore, who have put this case so clearly before me, I am prepared to say that the conditions are complied with and that the husband is entitled to a decree nisi.

Decree nisi.

Solicitors: *Skelton & Co., agents for Wall, Johnson & Hopwood Sayer, Wigan; Official Solicitor.*

WOOLLARD *v.* WOOLLARD.

1954
Oct. 6, 7, 8, 11, 12.

Mr. Commissioner Latey Q.C.

Husband and Wife—Divorce—Cruelty—Intention to injure—Offence against third party—Effect of convictions for fraud.

A husband was convicted of fraudulent conversion in 1939, of theft in 1941, and of obtaining money by fraud in 1951. Money obtained by fraud had been paid into the wife's banking account without her knowledge of its true origin. The husband was bound over in 1939, and sentenced to terms of imprisonment in 1941 and 1951. Evidence was given and accepted that the wife's health had been seriously affected, that the wife's justifiable remonstrances had been met with resentment, that the husband had failed to realize a promise to reform, and that the wife's health had been further affected by the fear and embarrassment which she had suffered on realizing that she might be involved in the 1951 proceedings:—

Held, that in such circumstances the husband must be held responsible for the consequences of his actions on his wife's health, and that cruelty had accordingly been established.

Warburton v. *Warburton* (The Times, July 10, 1953) distinguished.

Petition by wife for divorce on the ground of cruelty.

The parties were married in August, 1934, and there were no children. The wife had only known the husband for about a month before the marriage and had broken off her engagement to another man to marry him. Evidence that she was at the time of the marriage unaware that her husband had already had two convictions, one for stealing watches and one for false pretences, was accepted. She complained that from the beginning of the marriage she was constantly harassed by having to leave various addresses because her husband had failed to pay the rent: this was denied with the exception of one occasion, and it was held that there was no evidence of cruelty in regard to this complaint.

In January, 1939, the husband was convicted at Middlesex sessions of fraudulent conversion of some £120, and was bound over. The wife was outside the court when sentence was passed, and was led to believe by her husband that he had been acquitted; but she learnt from a solicitor of the offences before marriage, and gave evidence in the present proceedings that her husband had told her that he had gone to prison voluntarily as a "stooge" for a branch of the Secret Service. It was held that she believed at that time in his innocence.

In February or March, 1939, the husband was made bankrupt, and for some time after the conviction of January, 1939, the parties mainly subsisted upon the wife's earnings. In July, 1941, the husband was sentenced to six months' imprisonment for a theft of furniture. She visited him in gaol, but on his release in November, 1941, she refused to go back to him. The court accepted in substance her evidence that on an occasion in Marylebone when the wife was refusing to return to the husband he took her by the throat, shook her, and said that he was not going on without her or she without him; that she was frightened but was able to get away from him and go to her mother, with whom she was then living, and that the husband went there late that night and created a scene, as a result of which the police were called and he left. Evidence that she had remonstrated with him about his convictions was also accepted.

For some months after this scene the wife neither saw nor heard from him; but early in 1942 he visited her and persuaded her to have a reconciliation. The reconciliation was upon the basis that the husband would turn over a new leaf, and for a time the parties were happy together. In 1944 he had to go to the Hebrides to face a charge of conversion; but he was acquitted, and the wife accepted his assurance that the matter was a mistake.

After the war the husband dealt in surplus war stores and claimed to have made nearly £3,000 in three years. The wife resumed secretarial work. Towards the end of 1947 the husband was charged with the theft of a film projector and sentenced at Kingston quarter sessions to 18 months' imprisonment; but his conviction was quashed by the Court of Criminal Appeal. The wife stated that she was very upset and afraid that he was going wrong.

In 1948 the husband met one Maclure and his mother, an elderly lady. In less than a year he obtained by fraud from the lady sums totalling some £1,700: his wife was at the time unaware of his offence. In June, 1949, she opened a banking account in her own name at the bank of which her employer was a customer; she said that she did so at her husband's request because, as he said, as an undischarged bankrupt he himself could not open an account. All the moneys paid in and paid out by cheque emanated from him, though she signed the cheques as "B. Woollard"; "B." representing her pet name "Bob." In effect he operated the account; and he explained that all the money paid in came from moneys paid to him in respect of patent rights and that most of it came from Holland and Australia. He claimed that none of the moneys improperly obtained from

Mrs. Maclure went through that account; but a detective sergeant in his evidence showed that at least one item of £45, paid in in August, 1949, came from that source. On July 17, 1951, the husband was sentenced to three and a half years' imprisonment at the Central Criminal Court, and the circumstances attending this conviction were made a charge of cruelty as set out below. He protested his innocence to his wife, and said that he had been made a "scapegoat," and for some time she believed him, although she was upset by the conviction. Normal relations had continued almost up to the time of his conviction in 1951.

The wife at first visited the husband regularly in prison and wrote many letters to him in terms of the greatest affection, and expressed fervent hopes for a complete reunion in due course; and in the early stages of his imprisonment she was convinced of his innocence although suffering keen anxiety. But towards the end of 1951, and after his application for leave to appeal had been refused, other matters began to come to her knowledge. Early in 1952 she was told by creditors of her husband that he had told them to look to her for payment, although she had no money apart from her wages. This matter was also made the subject of a charge of cruelty in the form set out below. On January 17, 1952, she wrote to her husband: "I do realize that "my letter was a stiff one, but I must develop a tough side to "my nature somehow or other; I cannot go through life being "pushed around and hurt so easily. It has undermined my "health too much as it is, and I have either got to develop a "hardness or go under—therefore the reason of my letter. "Furthermore, I have to keep working; therefore I must at all "costs keep my health as much as I can. I know it does not "sound like me, Leslie; but, there, you knowing me will realize "just what I have to contend with when these people start on "me about things you have told them; they just disbelieve me "when I plead ignorance."

From that time on her letters became less affectionate, and on April 13, 1952, she wrote a letter in which she directly blamed him for her bad health: "You always say my nerves are due to "60—you tell me to be honest, but you know if you were honest "you would admit my nerves are solely brought on by the little "financial troubles that arise with you. That is why I always "resent you blaming others. I must honestly tell you, Leslie, "my whole feelings are easier right now, and my only spell of "nerves is due to the strain I went through and the worry of the "future. You will say I have changed; but, really, it scares me "to think I may have to face it again—worrying about what will "happen. I know it is rotten of me to write this way, but if "you would only realize the strain you have put on me you would "not blame 60" [the address at which she lived with her mother, who died in May, 1952].

On July 12, 1952, she wrote: "Dear Leslie, I know you will "have been waiting for this and wondering what excuse I have "for the delay. I have none other than pure 'funk,' as I want "to tell you we cannot go on. I have tried each time I have "seen you; but when visiting you I always feel very sorry to see "you there, when it is all so unnecessary. Please do not start "saying I am being influenced or that I have found somebody "else—neither are true. I have thought and thought about the "future, and I really feel I cannot face any more trouble—and "I cannot convince myself that there will be no more.

"If you stop to think—I am nearly 45—I have no home, no "prospects of any and I am still having to work to keep myself. "But for my Mother, who was always a bone of contention "between us, I should have had some very rough passages. "You know, if you stop to think as seriously about my position "as you do about the pound and its troubles, I am in a very "precarious one. [She was referring to the husband's interest "in finance.]

"God knows I hate writing this to you, but it is very difficult "to tell you when I see you. I have thought things out and "when you are due to come out I shall have deposited some "money for you and let you know where your things are; but I "shall get a job somewhere away where I can make friends and "build a reasonable life for myself. When I think what my life "is just now I realize what a miserable future I have. I have "no friends, as those you had dropped me and any I had I feel "ashamed to meet, so avoid them. No doubt they would be "sympathetic, but I don't want pity. You will say I have not "had a bad life—you have always said that. True, I took the "good with the bad; but as things are I feel the bad overrules "the good and the good times are not worth it.

"Please read this as reasonably as you can and try to see "my point of view. I know only rats desert the sinking ship, "but I'm afraid my ship sinks too often; and I cannot, no matter "how I try, feel that I can ever have faith in you . . . for my "own sake mentally and physically I must make a break."

A little later she wrote: "Please do not think it is a very "hurried decision, and I quite realize I made certain promises

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" previously," and on July 29, 1952, she wrote: " I know I " made promises. At the time I made them I meant them, " but I had not had a chance to know what life was going to " mean to me, and I know now I have got to depend on myself " and make a new life for myself—settle down to the fact that " I must work for the rest of my life," and referring to her health said: " I'll have to try and pull up as the doctor warns " me each time I get these attacks they get worse, and if I'm " not careful he'll have to put me in hospital for two or three " months to endeavour to get my nerves right, and I don't " want that."

In another letter she said: " Though I know you will stress " the mental strain you are undergoing, you seem to overlook " the fact that I have suffered an equal mental strain, in fact " probably more so as I feel I have not done anything that " warrants such punishment," and referring to her mother, added: " I fail to see how she altered our lives or how she can " be blamed for your present position. You know you had slipped " before ever you met me, and she was certainly not to blame " then. Because of those slips it was really up to you to be " extra careful; and really, Leslie, though you say you have " loved me for 18 years, I really wonder whether you did; and " if you did how is it you are now in the present position? It " could have been avoided; you know that if you are honest. . . . " I cannot see why you will never admit you are in the wrong— " always everybody else is wrong. Now even I am in the wrong " because I try to make a decent life for myself and stop being " dependent on other people hurting my feelings. I am sorry, " Leslie, but I am not going to take a chance on it all being " broken up again. I have had enough; I cannot be hurt any " more, I don't want to be hurt any more, I am broken completely, the spirit has been cut out of me entirely and I feel I " have had enough."

On August 16, 1952, she wrote to him: " I have seriously " thought over everything and I really feel I am doing the right " thing in arranging my future alone—making a break and " clearing off. I know you say I am playing a filthy trick—and " I have a bad conscience about it. I have not and I do not " think I am being ' filthy.' I think I am being sensible and " have developed a mind of my own for once—and am using it " properly."

She ceased to visit her husband in gaol and decided to bring divorce proceedings, and on February 10, 1953, told him in a letter: "Dear Leslie, I have not visited you as I was advised "not to. I told you I was inquiring about a divorce and the "solicitor says I should not visit you until we know what the "position is."

Her change of attitude and her decision to take divorce proceedings brought on her a series of bitter and resentful letters from her husband, to which she referred in a letter dated January 19, 1953: "I received your letters. I am much better "now, but you told me to think things over seriously when I "saw you last, then you have written me in the last three "letters that I am rotten, disgusting, bestial, cruel and other "such phrases—and frankly, taking into account everything that "has happened, how I have accepted your promises again and "again, only to have everything crash round me, whatever your "condition now they are unfair phrases to use. I am sorry, but "I cannot face life again with you. I know I had some happy "times with you, but my health would not allow of a return to "the worry of what you were doing during the day and where "you were. You must realize all that told on my nerves, even "without worries over mother. This will give you a further "chance of calling me vile names, but I cannot help it."

In a letter which was written early in 1953 by the husband to the wife he said: "You little know me, or my love for you, "if you have believed that I should upon my release hold you "to your married duties against your own emotions or wishes"; and on February 15, 1953, he wrote: "I need hardly tell you "that my first reaction to it was one of absolute and utter "disgust. Disgust that anyone who has had and enjoyed over "18 years the love, the understanding, the support, the devotion "and the unending consideration of all your demands, and those "of your family upon our married life, could ever have con"sidered, much less taken, the 'steps' you now tell me you "'have taken advice upon'—namely, divorce. After my very "full, frank and sincere letter of three weeks ago, that such a "rotten and filthy action could follow from you, unless (and it's "a very big unless) your health and present nervous condition "is responsible . . . For 18 years you have had everything you "wanted and your own way in every matter that would cause "you distress if refused. I have in my weakness, or rather, in "my love for you, allowed you to let your family's demands "upon you, and our life together, to be studied and met regard"less of the cost in jobs, income or, as it has proved, in even "my personal freedom."

Several other letters from him in a bitter strain were before the court.

He was released from prison in February, 1954, after the petition had been filed, and made attempts to force himself upon his wife in an attempt to try to induce her to start life afresh.

In the petition the criminal prosecutions and the assault in Marylebone in 1941, were alleged as charges of cruelty, and it was also alleged that: "At about the end of May, 1949, "the respondent told the petitioner that in connexion with "certain Dutch transactions he wanted to open a bank account "but could not do so in his own name as he was an "undischarged bankrupt. The petitioner accordingly opened a "bank account for the respondent in her name at [a certain "bank in Hampstead]. From time to time the respondent "paid, or gave to the petitioner to pay, moneys into the said "account, and the petitioner on his instructions drew money out "of the account. Some of the moneys paid into the account "were moneys in respect of which the respondent was sentenced "at the Central Criminal Court on charges of obtaining money "by false pretences from Mrs. Maclure. The petitioner alleges "that the respondent induced her to operate the account well "knowing that thereby he might involve her in criminal proceedings and put her in jeopardy of the criminal law, and greatly "embarrassed and distressed her, particularly by reason of the "fact that the petitioner on behalf of her employer continued to "have dealings with the bank"; and that: "The respondent "falsely informed various persons that the petitioner would be "receiving money from Holland on his behalf, and whilst the "respondent was in prison the petitioner had telephone calls from "one Mitchell requesting she pay over to him money which she "was receiving from Holland and which the respondent owed "him, causing the petitioner great embarrassment and distress. "The petitioner received similar requests from the landlady at "Kingdon Road where they had their flat. The petitioner "received many telephone calls from various other persons, "including persons named Birch and Kerr, who stated the "respondent owed them money and had informed them the "petitioner was in receipt of moneys on behalf of the respondent "from Holland and that the petitioner would satisfy the debts "out of the said moneys, greatly distressing her; and when the "petitioner visited the respondent in prison and told him of "these matters the respondent did not deny the falsity of what "he had told the persons set out above, was wholly indifferent

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"to the embarrassment and humiliation caused thereby to the "petitioner and merely told her not to worry."

P. R. Hollins for the wife.
John Mortimer and *David Knight* for the husband.

The submissions of counsel, and the cases cited in argument, are referred to in the judgment.

MR. COMMISSIONER LATEY Q.C. stated the facts set out above and said that if the husband failed to inform his wife before their marriage of his previous convictions, that was a matter which went merely to his discredit: it could not be brought in as cruelty on his part. There was, also, no evidence of cruelty in regard to the alleged failure to pay the rent; that only went to show the troubled life which the wife had had owing to the husband's erratic mode of existence. Referring to the conviction of 1951, the commissioner said: To his wife he strenuously professed his innocence and said that he had been made a scapegoat for another man, and for some time thereafter she believed him. Quite naturally any honest wife would be upset by such an event in her life, but what I have to decide is whether the conviction, coupled with his previous convictions since the marriage, had such a disastrous effect upon her as to injure or jeopardize her health.

I do not find that the conviction in 1939 affected her health adversely, although it was a melancholy augury for the future. As to the 1941 series of incidents which I have described, I have heard no evidence that the husband's conduct affected her health at that time; but it is abundantly clear that she was very much upset by what had happened and by his vague threat and rough handling. Here was an act on his part which might well have raised a fear in her mind that she could not entrust herself to his care; but in view of the subsequent reconciliation this single direct act of cruelty, as I find it, was condoned. It is common ground that after the reconciliation they lived together very happily for three years. When he was arrested in 1947 on what turned out to be an abortive charge, owing to past experiences she was very worried; but having regard to the quashing of his sentence, that episode cannot be held against him.

[The commissioner read the allegation set out above referring to the circumstances leading up to the 1951 conviction, and said that the whole of the paragraph was supported by the evidence, and that the wife had been questioned by the police about the source of the money which had been paid into the bank account. Although the police had come to the conclusion that she had had no part in her husband's fraudulent transactions, she must quite obviously have been very upset by the mere suspicion that she had participated in them. The commissioner then referred to the affectionate nature of the earlier correspondence after the sentence of imprisonment, and to her belief at that time in his innocence, and said that the wife had given evidence of the sufferings which she had endured and of the effect upon her nervous health at that time. She had also spoken of being very upset by the unsettled life which she had had to lead since 1949, and in her letter, she told her husband of the way in which her health had been affected. Speaking of the injury to the wife's health, the commissioner said:] Towards the end of 1951 it became apparent, I believe, that his leave to appeal had been refused and that other things had come to her knowledge. However, dealing with the question of her condition of health at that time, her doctor has corroborated that since 1949 he often had to treat her for her anxiety state, which became worse after her husband's conviction in 1951, and that worsening he attributed to the fact of her husband's conviction. Although the doctor expressed the opinion that her life became easier after her husband went to prison, that expression of opinion was rather too vague to give me any assistance. He confirmed the fact that the wife's nervous system had been thoroughly upset. The husband attributed her nervous indisposition to an unhappy home life and a domineering mother and excessive domestic work. Her mother died in May, 1952, and there is no doubt that the petitioner worked very hard at home. She described a good deal of the work she was doing in a letter to her husband. My conclusion is that it was a combination of both influences which upset her nerves, coupled with the melancholy circumstances necessarily surrounding her visits to her husband in gaol; but, as she very fairly put it herself, if it had not been for her worries over her husband the home difficulties would have gone for naught. I attach no importance to the fact that in her early letters to her husband in gaol she made no allusion to his past indiscretions; it merely proves the loyalty and the nobility of her character. But early in 1952 her feelings underwent a change after she had been dunned by creditors of her husband who had told her that he had told them to look to her for payment.

although she had nothing but her wages. In this connexion I have again to refer to the pleadings.

[The commissioner read the second paragraph set out above, and said that he accepted her evidence, which supported the allegations. She had gradually realized that all her husband's professions of being the victim of misfortune, and that he was never in the wrong, had been sheer humbug. The commissioner read the letter of January 17, 1952, and the subsequent letters set out above, and referring to the letter from the husband of February 15, 1953, said that the husband was suggesting that he was devoting so much of the money he had to his wife and her family that he had been tempted into criminal courses. That evidence was not to be accepted. The commissioner continued:] He wrote several long, bitter, resentful letters vilifying her, and those letters abounded in expressions of self-pity and self-righteousness, and in somewhat scurrilous reflections on what he considered her disloyalty. With due regard to the fact that he was in prison, those letters do him very little credit having regard to the way in which she had stuck to him through thick and thin, save for her temporary refusal to return to him in 1941. He hurled these reproaches at her without a word of gratitude for the love and affection she had bestowed on him for so long.

He was released from prison in February, 1954, and apart from forcing himself on her on several occasions to try to induce her to start life afresh that is the end of this sorry story.

He is now working as a motor-driver. In the witness box he was aggressive, argumentative and, as his wife had pointed out, almost invariably seeking to show he was never in the wrong except when he could not get over the facts of his convictions. In the main I very much prefer his wife to him as a witness of truth. She was calm and collected; she showed no vindictiveness against her husband and did not hesitate to give him praise now and then, as when she said that if in funds he was generous to her. Despite the verdict of the jury (before whom the husband had pleaded not guilty and had gone into the witness box in his own defence) his wife still thought that he was innocent and thus wrote to him the loyal and loving letters, from which I have cited passages. It was not until she became certain in her own mind, from information received, of his guilt that she decided on divorce proceedings. This revulsion of feeling, coupled with her husband's epistolary outbursts of indignation, might very well have retarded her recovery from a state of nervous upset which she had reached.

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Mr. Commissioner Latey Q.C.

Matters which occur after a petition is filed are admissible to throw light on the conduct and disposition of an accused party prior to the commencement of proceedings and, therefore, one cannot ignore the fact that after her husband's release she was subjected to a certain amount of molestation on his part which was not calculated to lessen her fears for the future.

Perhaps I ought to say that although condonation has not been pleaded, her affectionate letters to him in prison did not constitute condonation: *Fearn* v. *Fearn.*[1]

Those being the facts as I find them, did the husband's conduct constitute cruelty as it has been defined and explained in these courts? In most European countries and in some of the British Dominions (for instance, South Australia), conviction for a serious crime is a ground for divorce. That is not so, however, in England, and here I have to deal with an allegation of cruelty.

Mr. Mortimer, in a well reasoned address, submitted that on the hypothesis that the court accepted the wife's evidence in substance as against the husband's (which I do), cruelty was not made out, and he cited to me the observations of Denning L.J. in *Westall* v. *Westall.*[2] The report does not set out the context of the facts of the case but, nevertheless, those observations have been taken as a guide to a very large extent in cases of cruelty in this Division. Denning L.J. said[2]: "Although "malignity is not an essential element of cruelty . . . nevertheless "intention is an element in this sense, that there must be "conduct which is, in some way, aimed by one person at the "other. . . . Defects of temperament, like defects of health, "must ordinarily be accepted for better or for worse. When "there is no intent to injure, they are not to be regarded as "cruelty unless they are not only aimed at the other party but "also are plainly and distinctly proved, not merely to cause "passing distress or emotional upset, but actually to cause injury "to health. . . . I would point out that there is much conduct "which may be injurious to the health of the other but which "if not aimed at him is not cruelty. The conduct of the habitual "drunkard, the gambler, the criminal or the profligate may cause "his wife to break down in health, but it is not cruelty unless "combined with some conduct which is aimed at her, as, for "example, when her justifiable remonstrances provoke unjust

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[1] [1948] P. 241; 64 T.L.R. 218; [1948] 1 All E.R. 459.

[2] (1949) 65 T.L.R. 337.

"resentment on his part directed at her." Denning L.J. gave a further explanation of what he meant by "aimed at" in a later case of *Kaslefsky* v. *Kaslefsky*.[3]

In regard to those principles enunciated by Denning L.J., Mr. Mortimer submitted there was no evidence of "justifiable "remonstrances" here; but I find that there were after the husband's release from prison in 1941. There was also an exhibition of "unjust resentment" by the husband by way of the Marylebone incident at that time. Further, there were "justifiable remonstrances" by the wife in letters to him in gaol which have been read, and "unjust resentment" in his subsequent letters to her.

But Mr. Mortimer called in aid the decision of Karminski J. in *Eastland* v. *Eastland*.[4] In that case the gravamen of the wife's charge of cruelty in an undefended plea for divorce was her husband's failure to make provision for her maintenance, his irresponsibility and his shiftlessness. The court found that although the wife's health had suffered it was not a case where the husband desired to injure her; and it was held that although there had been hardship and unhappiness caused by the husband's grave defects of character as well as by his conduct, his conduct was negative; it was not aimed at the wife, nor directed against her, nor did it in any way impinge upon her, and, therefore, deplorable though it may have been, it fell short of cruelty.

In that case the wife's charges of cruelty fell far short of those here, and, indeed, it was on the pleadings a somewhat flimsy case except for one charge in paragraph 15; and bearing in mind that the only issue left in the present case is whether the effect of the various convictions on the wife constitutes cruelty, *Eastland* v. *Eastland*,[4] having regard to its context, hardly assists, although the judge most usefully reviewed the authorities on the principles to be applied. But in this case the conduct of the husband undoubtedly did impinge upon the wife's well-being.

Mr. Mortimer prayed in aid the wife's belief in her husband's innocence in 1951, and her anxious waiting for the result of his application for leave to appeal, which failed. That, to my mind, only serves to show what a loyal wife she was, hoping against hope that his professions of innocence would be accepted. Her attitude in no way detracted from the effect of his conduct on her health, especially as she was worried by the fear that she might be accused of participation in his crime. He also prayed in aid the judgments of the Court of Appeal in *Warburton* v. *Warburton*.[5] That was a very similar case to this except that there was only one conviction of the husband respondent since the marriage as compared with three in this case. There were observations made by two of their Lordships in *Warburton* v. *Warburton* [5] to which I have to draw special attention. For instance, Jenkins L.J. said: " It is not possible to hold that this " one criminal act of larceny in respect of which the husband was " convicted after the marriage amounted to cruelty towards his " wife . . . it is easy to imagine cases where the criminal career " of the husband might in some way implicate the wife against " her will, as, for example, in a case where the matrimonial " home was made a receptacle for stolen goods. To a case of " that sort other considerations might apply. . . . Nor is this " a case in which there have been repeated thefts by the husband " during the marriage."

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[3] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

[4] [1954] P. 403; [1954] 3 All E.R. 159.

Hodson L.J. said: " It was not a case of a man who had " previously lived a criminal life and had promised his wife to " reform and to lead a different life after marriage. . . . I do " not wish to be taken as saying that in no circumstances could " persistence in a course of criminal conduct be a basis for a " charge of cruelty where the necessary ingredients are present " of physical injury or apprehension of the same."

In *Warburton* v. *Warburton* [5] the Court of Appeal found that there had been no injury to health. In this case I find there was injury to the health of Mrs. Woollard, and the question is whether it can be attributed to the conviction of 1951 coupled with the background of the earlier convictions since the marriage.

I have considered in their context the authorities on the principle that cruelty must be " aimed at " the suffering spouse, including Denning L.J.'s pronouncements to which I have already referred.

Mr. Hollins referred me to *Jamieson* v. *Jamieson*,[6] in which it was laid down that though actual intention to hurt may in a doubtful case be decisive, it is not essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty. On that point the speeches of Lord Normand and Lord Merriman P. bear out the proposition I have just read out. I have also considered three cases cited by

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[5] The Times, July 10, 1953.

[6] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

Mr. Hollins in which sexual offences against girls by the husbands were held to constitute cruelty against the wives: *Thompson* v. *Thompson*[7]; *Bosworthick* v. *Bosworthick*[8]; and *Boyd* v. *Boyd*,[9] which is also mentioned in *Edwards* v. *Edwards*.[10]

It was pointed out that the Court of Appeal in the most recent case of *Warburton* v. *Warburton*[11] did not shut the door completely to a case like the present, which has to be considered on its facts; and it appears to me that the present case possesses some of the elements of exception envisaged by their Lordships in that case.

I find, therefore, that by the circumstance of the husband's indulging in activities since the marriage which resulted in three convictions, and by reason of her justifiable remonstrances in 1941 and his unjust resentment (both practically repeated in 1951), by his promise to reform which he failed to realize in 1951, by the injury to her health which she suffered in 1951 and 1952 as the result of his conduct, including the fear and embarrassment which she experienced on realizing how she might have been dragged into the Old Bailey case as a result of her opening a banking account at his instigation, he was guilty of cruelty, and he must be held to be responsible for the consequences of his actions on his wife's well-being.

In conclusion I feel I ought to pay a tribute to Mr. Knight who, in Mr. Mortimer's temporary absence, most admirably conducted the case on behalf of the husband. I therefore pronounce a decree nisi of divorce on the ground of the husband's cruelty.

Decree nisi.

Solicitors: *Harold Kenwright & Cox; P. Simes, The Law Society, Divorce Department.*

J. B. G.

[7] (1901) 17 T.L.R. 572.

[8] (1901) 18 T.L.R. 104.

[9] Post, 126; 55 T.L.R. 3; [1938] 4 All E.R. 181.

[10] [1948] P. 268; 64 T.L.R. 61; [1948] 1 All E.R. 157.

[11] The Times, July 10, 1953.

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Lord Merriman P. and Karminski J.

Husband and Wife—Justices—Cruelty—Intention to injure—Offence against third party—Indecent assault on child of marriage—Remission to justices for composite picture.
Husband and Wife—Divorce—Cruelty.

Sexual offences against third parties which are directly relevant to the conjugal obligations of a husband may be cruelty to the wife.

Thompson v. *Thompson* (1901) 17 T.L.R. 572; 85 L.T. 172; *Bosworthick* v. *Bosworthick* (1901) 18 T.L.R. 104; *Boyd* v. *Boyd,* post, 126; (1938) 55 T.L.R. 3; [1938] 4 All E.R. 181 (in so far as cruelty was found) approved and applied.

A husband pleaded guilty to, and was convicted of, an indecent assault upon the child of his marriage. His wife's complaints to the justices of persistent cruelty and desertion based upon the admitted assault upon the child, and certain misconduct towards her, were dismissed, the justices preferring the evidence of the husband where there was a conflict and holding that there was no evidence to show that the assault upon the child had been committed with the intention of causing his wife pain, nor in her presence:—

Held, (1) that the assault, which was an offence which must by its nature go to the very root of the marriage relationship, was one which any man of ordinary intellectual capabilities must have known, had he paused to reflect, to be likely to cause the gravest distress to the mother of the child, his wife, and possibly severe injury to her health.

Observations of Denning L.J. in *Kaslefsky* v. *Kaslefsky* [1951] P. 38, 46; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398 applied.

(2) But since it was essential in a case of alleged cruelty to judge every act in relation to its attendant circumstances, the condition or the susceptibilities of an innocent spouse, and no less the offender's knowledge of the actual or probable effect of this conduct on the other's health, the matter should be sent back for a re-hearing by the justices who had misdirected themselves on the issue of cruelty, so that a composite picture of the whole case might be formed upon which to reach a decision.

Per curiam. An actual intention to injure is not an essential averment in cruelty, although in a "doubtful" case it may be of decisive importance. Conduct which is the consequence of mere obtuseness or indifference may none the less be cruelty.

Jamieson v. *Jamieson* [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875 considered.

Appeal by wife from the refusal of the justices for the petty sessional division of Croydon on May 25, 1954, to make an order on her summons alleging desertion and persistent cruelty.

The following statement of facts is taken from the judgment of Karminski J.: The parties were married in 1940, when the husband was serving in the Army, in which he continued to serve for a good many years afterwards. There was one child of the marriage, a girl, who was born in October, 1944. The marriage did not appear to have gone smoothly. It was apparent from the evidence that up to about the end of the recent war the periods of cohabitation between the parties were very broken and infrequent. But in 1947 the parties separated, after what the wife alleged to have been a serious assault, and after an incident which the husband admitted to have been a serious quarrel. Some time not long after the separation in 1947 the wife committed adultery, which resulted in the birth of a child which was not a child of the marriage. At that time the husband appeared to have been serving in the Army overseas. The child was adopted; but on September 8, 1948, the husband filed a petition alleging adultery by the wife and praying for a dissolution of his marriage on that ground, which was never proceeded with on the husband's instructions. It appeared from the husband's evidence that when he discovered that his wife was pregnant by another man there was a quarrel, in which the husband said that he struck her, but the wife made no complaint of that incident. In 1950 the husband returned to this country and effected a reconciliation with his wife which lasted one month. That resumption of cohabitation was apparently terminated by the husband being again posted abroad on military service, and the parties continued to live separate and apart until July, 1953. In that month cohabitation was again resumed, after some negotiation, and the parties lived together until April, 1954. There was evidence of serious quarrels and deep differences of opinion during their life together, and the husband said in the course of his evidence that he thought that they had been mutually guilty of mental cruelty towards each other. The wife, who made a number of complaints, some serious and some otherwise, alleged that in the course of that cohabitation the husband attempted sodomy upon her, but her evidence in support of that allegation was wholly uncorroborated and the justices did not accept her charge or the truth of it in the face of the husband's denials. In October, 1953, there was some trouble over the birthday party of the child of the marriage, but matters reached a serious crisis over the Easter holiday of 1954. On Easter Monday, April 19, 1954, a dispute arose between the husband and the wife over some guests she had invited to the house, and she complained that the husband was rude to the guests, and in her presence.

The husband said that the real trouble between them was largely caused by the wife's brother, whom the husband apparently regarded in no very favourable light, and who, he said, was a constant visitor. But on the Tuesday, following some disagreement over the invited guests, a much more serious event took place. On that day the husband admittedly indecently assaulted the child of the marriage, who at that time was aged about 9½. The details of the indecent assault were not in evidence, and were not before the justices; but the husband admitted when he gave his evidence that he had pleaded guilty to that charge, for which he had been fined £20 on April 29, 1954. The wife complained that later that night the husband attacked her, after some quite trivial dispute over a household fitting, and that he knocked her over after striking her. The husband admitted that there had been what he described as a nasty argument with his wife, and that some measure of violence was offered by him to her, but he said that he did not knock her over, and that, although she fell, her fall was caused by slipping on the mat. It was after that dispute on April 20, 1954, which terminated in the husband leaving the house, that the wife heard something from her child which led to her communicating with the police; this was followed by the husband's arrest. He was remanded in custody at Brixton, and while awaiting trial wrote two long and penitent letters, to which reference is made in Karminski J.'s judgment. On April 28, 1954, the wife issued her summons alleging that her husband had deserted her on April 20, 1954, and that he had been guilty of persistent cruelty to her, and on May 25, 1954, the justices dismissed her complaints. The reasons given by the justices for their decision are considered in Karminski J.'s judgment.

The wife appealed.

Miss Morgan Gibbon for the wife. A husband who indecently assaults the child of the marriage and thereby causes injury to the wife's health must be held to have been guilty of cruelty. Lord Merriman P. said of *Boyd* v. *Boyd*[1] in *Edwards* v. *Edwards*[2]: "I cannot understand how any man who has been "taken back after one such incident by a sensitive and decent "woman could contemplate anything else than that a repetition "of that offence would have the same effect." That passage is applicable even if there has not been a previous offence: any husband guilty of an offence such as this, which is one against the matrimonial life, must be taken to have intended the natural consequences of his misconduct upon his wife. [Reference was made to *Simpson* v. *Simpson*,[3] *Boyd* v. *Boyd*,[4] and to the judgments in *Jamieson* v. *Jamieson*[5] of Lord Normand,[6] Lord Merriman,[7] Lord Reid[8] and Lord Tucker.[9]]

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[1] Post, 126; (1938) 55 T.L.R. 3; [1938] 4 All E.R. 181.

[2] [1948] P. 268, 271; 64 T.L.R. 61; [1948] 1 All E.R. 157.

[KARMINSKI J. It would appear that the justices might have tried to " compartment " the various allegations of cruelty in the manner criticized in *Jamieson* v. *Jamieson*.[10]]

The whole of the attendant circumstances must be considered: see *King* v. *King*,[11] *per* Lord Reid[12] and Lord Asquith[13]; those circumstances in this case include the other acts of ill-treatment. There are two other cases in addition to *Boyd* v. *Boyd*[14] where sexual offences against third parties were held to amount to cruelty to the wife: *Thompson* v. *Thompson*[15] and *Bosworthick* v. *Bosworthick*.[16] The decisions in these three cases upon the issue of cruelty do not appear to have been doubted; and it is submitted that they provide direct authority for a finding of cruelty in the present case. [Reference was also made to *Bartholomew* v. *Bartholomew*,[17] but the issue of desertion was reserved for further argument if desired at a later stage.]

J. F. Coplestone-Boughey for the husband. Although it is not intended to press argument on desertion, it is submitted that the case is one in which the conduct of which complaint is made is either cruelty or not cruelty and in which the allegation of desertion could not succeed if cruelty were not found: *Pike* v. *Pike*,[18] *Timmins* v. *Timmins*.[19] The finding of cruelty in *Boyd* v. *Boyd*[20] has not been doubted; but in considering that decision in *Simpson* v. *Simpson*[21] emphasis was laid on the fact that the husband had been convicted for the second time of a sexual offence which was "directly relevant to his conjugal obligations." Cases on misconduct conducing in which the husband has been guilty of a crime show that "such neglect or misconduct, to come within the meaning of the section [section 31 of the Act of 1857], must be neglect of or misconduct towards the other spouse on the part of the petitioner": *Cunnington* v. *Cunnington and Noble*,[22] where the petitioner was convicted of feloniously opening a letter. See also *Williamson* v. *Williamson and Bates*,[23] in which it was stated that a conviction was no justification for refusing to live with the offender.

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[3] [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

[4] Post, 126; 55 T.L.R. 3; [1938] 4 All E.R. 181.

[5] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[6] [1952] A.C. 525, 534–6.

[7] Ibid. 540–2.

[8] Ibid. 548–9.

[9] Ibid. 550–1.

[10] Ibid. 551.

[11] [1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584.

[12] [1953] A.C. 124, 140.

[13] Ibid. 147–8.

[14] Post, 126.

[15] (1901) 17 T.L.R. 572; 85 L.T. 172.

[16] (1901) 18 T.L.R. 104.

[17] [1952] W.N. 535; [1952] 2 T.L.R. 934; [1952] 2 All E.R. 1035.

[18] [1954] P. 81n.; [1953] 3 W.L.R. 634n.; [1953] 1 All E.R. 232.

[19] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.

[20] Post, 126.

[21] [1951] P. 320.

[LORD MERRIMAN P. observed that cruelty and misconduct conducing were separate discretionary bars.]

It is submitted that the same principles apply, and that in both the misconduct must be "misconduct by the husband, . . . in his marital capacity, and must be a breach of some marital duty": *Cunnington* v. *Cunnington and Noble*.[24]

Although cruelty was found in *Thompson* v. *Thompson*,[25] *Bosworthick* v. *Bosworthick*[26] and *Boyd* v. *Boyd*,[27] in cases where the offences were committed with third parties, they are to be distinguished because there had in each case been a repetition of the offence. The husband knew the effect of the first offence upon his wife, and in such circumstances must have known that a repetition of the offence would have a similar detrimental effect upon her. The element of persistence is also found in *Simpson* v. *Simpson*.[28]

[KARMINSKI J. Although there was only one indecent assault in this case, the child was a child of the marriage.]

[LORD MERRIMAN P. The husband must have known the effect upon his wife of such an assault.]

It is submitted that he never thought of the effect on his wife when he committed the offence, and that the law should not impute to him an intention which he did not in fact have. A crime is not ordinarily "aimed at" a wife, although different considerations arise when a second offence is committed. The inference of intention is one which may, not must, be drawn: *Jamieson* v. *Jamieson*,[29] *Simpson* v. *Simpson*.[30]

[KARMINSKI J. But there is evidence here of physical

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[22] (1859) 1 Sw. & Tr. 475.
[23] (1882) 7 P.D. 76.
[24] 1 Sw. & Tr. 475, 477.
[25] 17 T.L.R. 572.
[26] 18 T.L.R. 104.
[27] Post, 126.
[28] [1951] P. 320.
[29] [1952] A.C. 525, 541.
[30] [1951] P. 320, 333.

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assaults also, of which there was none in the earlier cases of sexual offences.]

If on all the evidence the inference of intention is not shown to be the correct inference, then it should not be drawn: *Westall* v. *Westall.*[31] That case, and *Kaslefsky* v. *Kaslefsky*,[32] show that conduct to be cruel must be " aimed at " the other spouse. In *Birch* v. *Birch*,[33] cited with approval in *Kaslefsky* v. *Kaslefsky*,[34] the husband had frequently beaten the child without cause in the wife's presence, but there was no finding of cruelty to her, for there was no proof of express purpose to wound her feelings. Cruelty was not found in *Cox* v. *Cox*,[35] because the husband was not shown to have intended to injure the wife by his associations with other women. *Sickert* v. *Sickert*[36] is a desertion case in which there was a strong element of persistence in the associations against the wife's wishes. " An intent to " injure, if not an essential element, is at any rate a most " important element in cruelty ": *Timmins* v. *Timmins*.[37] " If " there is no desire to injure . . . the conduct only becomes " cruelty when the justifiable remonstrances of the innocent " party provoke resentment . . .": *Kaslefsky* v. *Kaslefsky*[38]— and there were no remonstrances in the present case.

[LORD MERRIMAN P. That passage must be considered in the light of *Jamieson* v. *Jamieson*,[39] where the consensus of opinion was that proof of actual intention to injure might turn the scale in a doubtful case; but *Jamieson* v. *Jamieson*[39] is not an authority for the proposition that an actual intention to injure is essential in every case.]

[KARMINSKI J. observed that the passage cited should be taken in conjunction with the earlier part of the paragraph.]

In *Warburton* v. *Warburton*[40] the husband's criminal activities were not directed at the wife, and in *Fowler* v. *Fowler*[41] the wife's refusal to have children did not amount to cruelty, for there was " no direct evidence that she was acting in any " way with the intention of hurting her husband." [*Bartholomew* v. *Bartholomew*[42] was also referred to.] My submissions may be summarized from *Kaslefsky* v. *Kaslefsky*,[43] and if the observations of Denning L.J. be said to have gone too far, I rely on the judgment of Bucknill L.J. (with which Somervell L.J. concurred), who stressed the importance of a finding of express intention to wound.[44] The decision was not disapproved in *Jamieson* v. *Jamieson*.[45] which dealt with a different type of cruelty. [Reference was also made to the reservations of Lord Reid in *Jamieson* v. *Jamieson*[46] and *King* v. *King*[47] as to cases where there was no intention to ill-treat.]

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[31] (1949) 65 T.L.R. 337.

[32] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

[33] (1873) 42 L.J.P. & M. 23; 28 L.T. 540.

[34] [1951] P. 38.

[35] [1952] 2 T.L.R. 141.

[36] [1899] P. 278; 15 T.L.R. 506.

[37] [1953] 1 W.L.R. 757, 760.

[38] [1951] P. 38.

[39] [1952] A.C. 525.

[40] The Times, July 10, 1953.

[41] [1952] 2 T.L.R. 143.

[42] [1952] 2 T.L.R. 934.

[43] [1951] P. 38.

[LORD MERRIMAN P. referred to *Hadden* v. *Hadden*,[48] as approved in *Squire* v. *Squire*[49]: "I do not question that he had "no intention of being cruel to his wife but his intentional acts "amounted to cruelty."]

[KARMINSKI J. The husband intended his act, for he pleaded guilty; his mind was on the act of indecency and not on his wife. Supposing that he knew what he was doing, and that it was wrong, can an intention to injure be inferred? In *Kaslefsky* v. *Kaslefsky*[50] the respondent wife's conduct was negative.]

But *Birch* v. *Birch*[51] was approved in that case. In considering an allegation of cruelty the court must have regard to all the attendant circumstances: see *per* Lord Tucker in *Jamieson* v. *Jamieson*.[52] In the present case the court should have regard to the whole history of the marriage in considering this question of intention—the wife's adultery, the husband's forgiveness after he had filed his petition, and the efforts which he made prior to the indecent assault to re-establish the marriage. The evidence showed him to have been very fond of his wife; and against such a background an intention to hurt the wife is not lightly to be presumed. [*King* v. *King*,[53] on forgiveness as a favourable consideration, was referred to.]

The fact that special provision for a wife is made by section 2 (*a*) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, where there has been cruelty to a child would seem to indicate that such cruelty is not necessarily cruelty to a wife. [Reference was also made to *Cooper* v. *Cooper*,[54] *Coffey* v. *Coffey*,[55] *Hosegood* v. *Hosegood*[56] and *Buchler* v. *Buchler*.[57]]

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[44] [1951] P. 38, 43, 44.

[45] [1952] A.C. 525.

[46] Ibid. 549.

[47] [1953] A.C. 124, 140.

[48] The Times, Dec. 5, 1919.

[49] [1949] P. 51, 57; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[50] [1951] P. 38.

[51] 42 L.J.P. & M. 23.

[52] [1952] A.C. 525.

[53] [1953] A.C. 124, 132.

[54] [1950] W.N. 200.

[55] [1898] P. 169.

[56] [1950] W.N. 218; 66 T.L.R. (Pt. 1) 735.

[57] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.

LORD MERRIMAN P. I am asking Karminski J. to deliver the first judgment.

KARMINSKI J., after stating the facts, referred to the two letters written by the husband while he was remanded in custody at Brixton prison awaiting trial, and said: I do not propose to read these letters in full, but they clearly were penitent in the sense that he made it perfectly plain that he realized that he had done wrong, and grievous wrong, in connexion with his assault on the child, and that he bitterly repented his action. There are signs in both letters, I think it is fair to say, of real affection for his wife and child, and deep regret for what he had done. So far as the future is concerned, he wrote, in what I think is probably the first letter, this phrase: "Forgiveness for you I know is out of the "question, but if you can after all this is over meet me at any "time, please let me know, I will be only too willing to help "more." He was referring there, I think, to financial matters. He concluded that letter in these terms: "Please come and see "me, love, just once, then I'll know what you intend to do. "Love you both so so much." The second letter was in similar terms, and he stated there that he did not think that they could ever "live together again as man and wife, we do not suit, how I "hoped that we could have got on together, our views are so "different, yet we could have done so well, no blame on you, "my fault for not being able to fall in with you, sorry about "that, so love, I think it is best that we part, and I do my best "to help." The wife did not answer those letters, or go to see him, and it is common ground that the parties never lived together again.

On April 28, 1954, the wife issued her summons, and the matter was tried before the justices at Croydon. The wife was represented by a solicitor, and the husband appeared in person, and it is obvious from the careful note which has been taken that although the only witnesses called were the wife and the husband respectively the matter was fully investigated. The wife gave her evidence but was not cross-examined by the husband, but when the husband gave his evidence he was fully cross-examined by the wife's solicitor.

Having heard the evidence, the justices dismissed both branches of the wife's complaint, namely, the desertion and the cruelty, and it is desirable to turn at once to the justices' reasons. Before I do that, I wish to say that, as I am about to criticize some of the reasons, I cannot conceal the fact that I feel a great deal of sympathy with the justices, who, though no doubt they received assistance from the wife's solicitor, had a party in person before them, and had to deal with a matter which, in my view at any rate, raises difficult questions of law. In the present hearing on appeal we have suffered no such disadvantage, because the matter has been most fully and, I would add, most carefully and skilfully argued by counsel both for the wife and for the husband; and, speaking for myself, I should like to express my personal gratitude for the care which they have taken in this case, and their anxiety, in which I think they have fully succeeded, to bring all the relevant authorities on this branch of the law before us. But, as I say, the justices, though they would be able to get help and guidance from their clerk, had not the advantage of an argument of that kind.

The justices begin their reasons by saying: "Having seen "the parties and heard their evidence we prefer to believe the "evidence of the husband rather than that of the wife." I pause there for a moment, merely to say this, that the justices, of course, had an immense advantage over us in a case of this kind in having seen and heard the parties personally, and were in a much better position than an appellate tribunal can be to form an opinion of the respective merits of their evidence. The justices in their reasons went on: "We were invited to say that certain "acts by the husband towards the child, coupled with his actions "towards his wife, constituted persistent cruelty towards his "wife." They then go into a little detail of some of the minor matters, and give their opinion that "even if these allegations are "accepted as true we do not consider that they constitute "cruelty to the child," and they continue as follows: "The "husband admits having been convicted of indecently assaulting "the child, but there is no evidence to show that the assault "was committed in the presence of his wife and with intention of "causing his wife pain. So far as the husband's actions towards "the child are concerned we find that they give very little support "to the wife's allegation that he has been guilty of persistent "cruelty towards her."

I pause there for a moment, because that paragraph goes to the root of one, at any rate, of the problems before us. The justices were right, I think, in saying that there was no evidence to show that the assault was committed in the presence of the wife; and, indeed, I myself am quite prepared to assume that a man who does what this father did to this child might even go to some pains to make quite sure that the mother of the child, his wife, was not present at the time. So far as the intention of causing the wife pain is concerned, I propose to deal with that later on, when I have to consider some of the authorities on this branch of the law.

The justices go on to point out, quite truly, that whereas the wife complained that her husband used physical violence to her on two occasions, the husband admitted to three. They then deal with the allegation of the husband seeking intercourse in an unnatural way, and point out that that was denied by the husband. I would repeat what I have already said, that the wife's evidence on that branch of her complaint, namely, the attempted unnatural intercourse, was wholly uncorroborated.

The justices then deal with some of the evidence of injury to health: "The wife further alleged," they say, "that she had "lost weight, but no evidence was called to show the cause of "such loss." They would seem, as I think, to have overlooked other matters of which the wife complained, namely, the fact that in 1947—the first assault—she complained that her thumb had been dislocated, and that on the last assault, on the Easter Tuesday [April 20, 1954] she was struck a blow which knocked her over. Then, quite rightly, they direct their own attention to the gap between 1947 and 1954, namely, seven years in which no assault is alleged by the wife against the husband. They then say this: "The husband's version of what took place at Easter, "1954, differs greatly from that of the wife, and we find that the "wife has not established that her husband has been guilty of "persistent cruelty towards her." I am bound to say that I have had a little difficulty in understanding that wholly. It is true that the husband puts a much less serious construction on the assault on the wife on the Easter Tuesday than she does; indeed, he does not, I think, admit an assault in the ordinary sense of the word, but said that there was something in the nature of a scuffle, which resulted in the wife falling over the bathroom mat. The wife, on the other hand, says the husband's blow was a more serious one, and knocked her over; but, allowing for the probable fact that in the heat of the moment neither party was taking mental notes of what was happening, I do not regard the difference between the two versions as either great or surprising.

The justices then deal with the other branch of complaint, namely, that the husband had deserted the wife, and I would preface this part of the case by saying at once that if the husband had treated the wife with cruelty she would be, in effect, on the facts of the present case, driven from the home. On the other hand, it may well be that if the facts which she alleges fall short of cruelty, she cannot now rely on them as conduct which caused her to leave home or expelled her from it. On the other hand, if the wife establishes cruelty, her complaint of desertion assumes, to my mind, a somewhat academic nature. The justices recall that the husband admitted the letter " saying that " it was not possible for him to live with his wife again," and that the wife said at the hearing that " she would not live with " her husband again," and continued: " We find, therefore, that " the husband is not absent from his wife against her will. We " do not consider that the evidence discloses matters of sufficient " weight and gravity to give the wife just and reasonable cause " for refusing to live with her husband. We were asked to give " weight to the conviction of the husband for indecently assault-" ing the child; this is the kind of offence which can vary greatly " in its degree of gravity, and no evidence was called before us " to show the nature of this particular incident." So far as the evidence was concerned, of course, the justices were right. The wife stated that the husband had been charged with and convicted of an indecent assault on his own child, the husband admitted that he had pleaded guilty to the charge, and in those circumstances one can well imagine that the solicitor who appeared for the wife was by no means willing, if it could be avoided, to call the child, who was then about 9½ years old, to give evidence of these distressing and loathsome matters before the court.

I am puzzled by the justices' view that this kind of offence can vary greatly in its degree of gravity. So far as the relationship between the parents of the child is concerned, one would have thought—I speak only for myself at the moment —that any indecent assault on a child, and in particular an indecent assault on a small girl who was, in fact, the daughter of the accused, must be an offence of at least some gravity; and further (and this is much more important for the purposes of this case) an offence which must by its nature go to the very root of the married relationship between the parents of the child.

The justices concluded their reasons by saying " that the " husband is not guilty of deserting his wife because the separa-" tion is consensual and she has no just and reasonable cause " for refusing to live with him."

On those facts and those findings it has been argued that

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the decision of the justices was against the weight of the evidence, and, further, that their decision was wrong in law.

I turn now to the law applicable to the facts of this case. The proposition that acts of sexual perversion or sexual irregularity may, under certain circumstances, amount to cruelty to the innocent spouse, would appear to have been long established. In *Thompson* v. *Thompson* [1] Sir Francis Jeune P. had before him the undefended petition of a wife on the grounds of the husband's cruelty and adultery. So far as the cruelty was concerned the wife complained that her health had been shattered because of her husband's conduct in respect of certain young women, two of whom, at least, he had taken into his house and nominally into his service; and in respect of one of whom he had been sentenced under what was then the Criminal Law Amendment Act, 1885, to 12 months' hard labour. Sir Francis Jeune P. held on those facts that the cruelty had been established, and pronounced a decree nisi accordingly. Shortly afterwards there was tried before Barnes J. *Bosworthick* v. *Bosworthick*,[2] in which the wife sought dissolution of her marriage from her husband on the ground of rape, and alternatively a judicial separation on the ground of his cruelty. The charges of rape and in the alternative cruelty related to the husband's conduct with young females. It was proved that some years before the break-up of the marriage he had indecently exposed himself to two small girls who were the guests of the family. The wife, however, forgave him, but after the resumption of cohabitation the husband respondent committed a whole series of indecent assaults upon no less than six small girls all under the age of 13 years, and for those offences he was sentenced to 20 months' imprisonment at the quarter sessions. The wife said that the husband's conduct had caused a breakdown in her health, and evidence was given that she had become what was described as an absolute wreck. Barnes J., in the course of his judgment, found that the charge of rape had been established, though it would appear there was some difficulty in ascertaining the fact, as there so often is in cases of that kind, from the girl who gave evidence; but he added that, although it was not necessary for him so to do. he had come to the conclusion that the charge of cruelty also had been established, and he referred to *Thompson* v. *Thompson*,[3] which I have just cited. I would point out that both these cases, *Thompson* v. *Thompson* [3] and

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[1] (1901) 17 T.L.R. 572; 85 L.T. 172.

[2] (1901) 18 T.L.R. 104.

[3] 17 T.L.R. 572.

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Bosworthick v. *Bosworthick*[4] were undefended cases, but both the eminent judges who dealt with them had the advantage of very experienced practitioners in these courts, in the first case Mr. Priestley and in the second case Mr. Inderwick and Mr. Harvey Murphy; neither of the judges, so far as the reports go, expressed any doubt or difficulty that the facts there set out could, and in those cases did, amount to cruelty in law.

The next case on similar facts is *Boyd* v. *Boyd*,[5] decided in 1938 by Bucknill J. The matter came before him in the first instance as a case of desertion, and on the allegation of desertion he felt himself in great difficulty, and decided that no case of constructive desertion had been made out. His decision on that part of the case has been the subject of a great deal of discussion, some approving, some disapproving, but I do not propose to deal with that aspect of the matter, and for this reason. At the conclusion of his judgment Bucknill J. gave leave to amend the petition by way of adding a charge of cruelty, and we are told, and I think it is agreed on both sides, that the subsequent history of the matter was this: the amended petition alleging cruelty was served on the husband, who did not contest it, and in due course Bucknill J. pronounced a decree on the ground of cruelty.[6] The facts of the case were these: After the marriage the respondent husband was convicted of the crime of incest with his daughter (though a daughter by an earlier marriage, and not the daughter of the petitioner). He went to prison for some five years, but served, I think, rather less. On his discharge from prison the petitioner forgave him and resumed cohabitation with him. But some three years after the resumption of cohabitation he was convicted of indecently assaulting a girl aged 12 years, and again sent to prison. The point under examination, as shown in the report, was whether or not the conduct of the husband amounted to desertion by him as against the wife, and Bucknill J., as I have already indicated, found that it was not in law desertion. But he did apparently find that those facts could, and in the circumstances of that case did, amount to cruelty.

I arrive, therefore, at this position, that until, at any rate, the year 1938, no difficulty, so far as we know, has ever been expressed, or at least reported, in these courts, in finding cruelty when a husband has been guilty of sexual offences of the type set out in these reports; and the industry of counsel in this case has

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[4] 18 T.L.R. 104.

[5] Post, 126; (1938) 55 T.L.R. 3; [1938] 4 All E.R. 181.

[6] Post, 126.

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not discovered any authority or any decision which doubts the correctness of the decisions in *Thompson* v. *Thompson*,[7] *Bosworthick* v. *Bosworthick*[8] or *Boyd* v. *Boyd*.[9]

So far the matter, so far as I am concerned, is without difficulty; but subsequent cases, though not referring in terms to these earlier cases, have raised doubts as to whether or not an indecent offence of the kind committed by the husband in the present case can be, either by itself or in conjunction with other conduct, a matter of cruelty committed against the wife. I do not propose, and I hope that I may be forgiven for the omission, to go in detail through all the authorities so carefully and fully examined by counsel, but I would turn for a moment to the decision of the Court of Appeal in *Kaslefsky* v. *Kaslefsky*.[10] That was an appeal from Judge Pugh sitting as a special commissioner, who had rejected an allegation by a husband against the wife of cruelty. The facts of that case were as different as it is possible to imagine from those of the present, since the husband there was complaining of a large number of acts of omission by the wife, which, he said, in the aggregate amounted to cruelty. The conduct of the wife was summarized, not, if I may say so, with undue harshness by the commissioner, in the single word "sluttish," and on appeal from his refusal to grant a decree of dissolution the Court of Appeal affirmed his decision.

I mention the facts in *Kaslefsky* v. *Kaslefsky*[10] because it is clearly desirable, when reading one or more passages from the judgments, that we should have in mind to what facts they were directed. Denning L.J., in the course of his judgment, said this[11]: "The conduct of one party can properly be said to be "aimed at the other when it consists of actions or words actually "or physically directed at him. Then it may be cruelty, even "though there is no desire to injure the other or to inflict misery "on him. It may consist in a display of temperament, emotion, "or perversion, whereby the one gives vent to his or her feelings, "not intending to injure the other, but making the other the "object—the butt—at whose expense the emotion is relieved. "The sick wife in *Squire* v. *Squire*[12] had no desire to injure her "husband, but she was guilty of cruelty because she made her "husband the butt of her inordinate demands. The moody

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[7] 17 T.L.R. 572.

[8] 18 T.L.R. 104.

[9] Post, 126.

[10] [1951] P. 38.

[11] Ibid. 46.

[12] [1949] P. 51.

"husband in *Lauder* v. *Lauder*[13] directed his sulkiness at his "wife, although he had no wish to hurt her. So also, the nagging "wife in *Usmar* v. *Usmar*.[14] These cases show that, when the "conduct consists of direct action against the other, then it is "not essential that there should be a specific intent to injure or "even to cause distress. Cases of this kind must, however, be "carefully watched. Where there is no intent to injure, they "are not to be regarded as cruelty unless they are plainly and "distinctly proved to cause injury to health.

"When the conduct does not consist of direct action against "the other, but only of misconduct indirectly affecting him or "her, such as drunkenness, gambling or crime, then it can only "properly be said to be aimed at the other when it is done, not "only for the gratification of the selfish desires of the one who "does it, but also, in some part, with an intention to injure the "other and to inflict misery on him or her. Such an intention "may readily be inferred from the fact that it is the natural "consequence of the conduct, especially when the one knows, "or it has been brought to his notice, what the consequences will "be, and nevertheless he does it, careless and indifferent whether "it distresses the other or not. But the court is not bound to "draw the inference: the presumption that a person intends the "natural consequences of his acts is one that may—not must— "be drawn. If, in all the circumstances, it is not the correct "inference, then it should not be drawn. In cases of this "kind, if there is no desire to injure or inflict misery on the "other, the conduct only becomes cruelty when the justifiable "remonstrances of the innocent party provoke resentment on "the part of the other which evinces itself in actions or words "actually or physically directed at the innocent party."

It was said in argument by Mr. Coplestone-Boughey that that expression of opinion is in some way inconsistent with that expressed by Bucknill L.J., with which Somervell L.J. agreed. I say at once that I cannot accept that criticism or that analysis of Denning L.J.'s judgment. I think possibly that he was adding something to the judgments of the other two members of the court. I do not think that he was differing from them in any way. The importance of Denning L.J.'s observations which I have just read lies, I think, in the words "such an intention "may readily be inferred from the fact that it is the natural

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[13] [1949] P. 277; [1949] 1 All E.R. 76.

[14] [1949] P. 1; 64 T.L.R. 500.

"consequence of the conduct, especially when the one knows, "or it has been brought to his notice, what the consequences will "be, and nevertheless he does it, careless and indifferent whether "it distresses the other or not." Applying that test to the present facts, I have to ask myself whether a man of apparently normal intellectual powers should or could know the natural consequences of an indecent assault on the child of the marriage on his wife. There is nothing in this case to show that the appellant wife was in any way hypersensitive in her feelings or abnormally slow in her reactions. I think, therefore, that one is justified in assuming her to be possessed of the normal feelings of an average mother, and cannot help but infer from that that a man in these circumstances who did what apparently he did to this small child must have assumed or known, if he thought about it, that it would cause the gravest distress and possibly severe injury to health to the mother of the child, his wife. But applying the second half of Denning L.J.'s test, if he does it careless and indifferent whether it distresses the wife or not, then the intention to injure may be inferred.

I pass from that case to one or two more recent ones which on the face of them may appear, until examined, to be inconsistent with the line of decisions terminating in *Boyd* v. *Boyd*.[15] In *Cox* v. *Cox*,[16] the Court of Appeal had to consider an allegation of cruelty which was based on a wife's complaint that the husband's action in associating with other women had injured her health. Her complaint had been dismissed by a special commissioner in Nottingham, and it would appear from the report that the complaints were limited to the husband's conduct with other women, and with one named woman in particular. Denning L.J., who gave, in effect, the judgment of the court (the other two Lords Justices agreeing without adding anything) said this[17]: "The judge [that is the trial judge] summarized his view by "saying: 'I think what happened in this case is that he presum-"'ably formed an attachment for this other girl, preferred her to "'his wife, and he was showing his preference, as men do, and "'neglecting his wife,' and he felt on the whole that the case "fell short of cruelty. I agree with that view. In *Westall* v. "*Westall*[18] and *Kaslefsky* v. *Kaslefsky*,[19] this court pointed out "that in many cases the intention of the party is of decisive "importance. This is one of those cases. It depends on whether

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[15] Post, 126.

[16] [1952] 2 T.L.R. 141.

[17] Ibid. 142.

[18] (1949) 65 T.L.R. 337.

[19] [1951] P. 38.

" the husband had an intention to inflict misery on his wife or " not. If he was simply in love with another woman, going about " with her and associating with her, and that caused his wife to " break down in health, then, in my view, his conduct cannot be " properly treated as cruelty. There may be some other grounds " of relief, but it is not cruelty. I find myself unable to say that " the judge was wrong here in finding that there was no cruelty."

The next case to which I desire to refer is *Warburton* v. *Warburton*.[20] That was an appeal from Mr. Commissioner Latey, who had granted the wife petitioner a decree on the ground of cruelty. In that particular case the wife's complaints seem to have changed, or at any rate, developed during the course of the hearing; but in the end they narrowed down to this, that the husband had injured the wife's health by his persistence in leading a criminal life. In fact, all that was found was that the husband had been convicted of dishonesty before marriage, as the wife knew. She had apparently married him in the face, not unnaturally, of family opposition, and the marriage had broken down because soon after the marriage the husband had been convicted again and sentenced to a term of imprisonment. His offence, as appears from the judgment, contained nothing of an indecent or sexual nature. He appears to have committed some offence of dishonesty, but the nature of his offences, or offence, was certainly not one in which any sexual matter was involved.

I do not think that it is necessary for me to refer in detail to the judgments which resulted in the decree being reversed, and I will content myself with reading one quite short passage from the judgment of Hodson L.J., who said: " As I understand the " law, there must be at least some evidence in considering cruelty " either of an intention to injure the other spouse or facts from " which an intention can be inferred. I cannot infer, so far as I " am concerned, any intention to injure the wife from the fact " that this man was convicted. The intention was that he wished " to get easy money, as the manner of his life showed in other " ways. The commissioner found that during the marriage, while " living in London, he had a job but that he was supplementing " his probably small wages by gambling. When he had money " raised in this way he spent it freely and sometimes in the company of his wife. I am quite unable to draw any further inference from the fact that he was convicted which is relevant to the " charge of cruelty other than that which I have already stated.

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[20] The Times, July 10, 1953.

"I would respectfully repeat what my Lord has said about "taking facts into the category of cruelty and the impossibility "of doing so. Lord Tucker. in the *Jamieson* case,[21] agreed with "what Lord Keith had said, 'that it is, generally speaking, not "'possible to compartment acts for purposes of relevancy as "'being gross, so as to constitute cruelty, or less gross so as not "'to constitute cruelty.' I do not wish to be taken as saying that "in no circumstances could persistence in a course of criminal "conduct be a basis of a charge of cruelty where the necessary "ingredients are present of physical injury or apprehension of the "same. I agree therefore that the appeal should be allowed."

I return for a moment to the very first sentence of the passage of the Lord Justice's judgment which I have just read in which he says, "there must be at least some evidence in "considering cruelty either of an intention to injure the other "spouse or facts from which an intention can be inferred." It must be borne in mind that these were not apparently reserved judgments, and the form of the words used was not perhaps very carefully considered by the Lord Justice. I shall, in a few moments, refer to the case to which he refers, namely *Jamieson* v. *Jamieson*,[21] but before I part from *Warburton* v. *Warburton*[22] I am bound to say this, that I have read the passage to which I have referred as an attempt to put, perhaps in a very concise form, what had been said rather more fully in earlier cases, especially in the passage from Denning L.J.'s judgment in *Kaslefsky* v. *Kaslefsky*.[23]

I come last to the decision of the House of Lords in *Jamieson* v. *Jamieson*.[24] That was a Scottish appeal, on what I think might have been called in earlier days in this country a demurrer. The ground of appeal was this, that the wife had raised a motion for divorce in Scotland on the ground of mental cruelty, which contained "averments that the husband had been guilty of "conduct calculated to hurt her and deliberately persisted in with "knowledge of the resulting injury to her health, and also that "resumption of cohabitation would entail reasonable apprehension "of danger to her health." It was held that the averments were relevant to go to proof. There are passages in the speeches of their Lordships which I think require some careful examination, having regard to what had been said in various forms in earlier, and to some extent in later, cases. Lord Normand, who delivered the first opinion, said this [25]: "There was some "difference of opinion between the Lord President and Lord "Carmont on the question whether a defender's conduct is to "be judged by a reference to its probable effect on the health "of a pursuer of normal susceptibilities or whether it is relevant "for a pursuer to aver that the conduct alleged did in fact "cause him or her mental suffering and consequent injury to "health. Neither of the learned judges proposed a dogmatic "answer, and for my part I am respectfully inclined to accept "the Lord President's view [26] that the conduct alleged 'must be "'judged *up to a point* by reference to the victim's capacity for "'endurance, in so far as that capacity is or ought to be known "'to the guilty spouse.' There is the high authority of Lord "Watson in *Mackenzie* v. *Mackenzie* [27] for the proposition that "much depends in each case upon its circumstances and in particular upon the victim's capacity for endurance. That leaves "it open to find, after evidence, that the pursuer was the victim "of his or her own abnormal hypersensitiveness and not of "cruelty inflicted by the defender. But the cases in which such "a decision would be possible without evidence must be "exceedingly rare, and this case is certainly not one of them." He goes on:—"The Lord President, I think, reaches the crux "of the case when he says [28] that 'Where the cruelty is of the "'type conveniently described as "mental cruelty," the guilty "'spouse must either intend to hurt the victim or at least be "'unwarrantably indifferent as to the consequences to the "'victim.' There is room for differences of opinion about what "kinds of case may be covered by the words 'unwarrantably "'indifferent.' I do not propose to go into that because I wish "to avoid the discussion of hypothetical cases and because I am "of opinion that actual intention to hurt may have in a doubtful "case a decisive importance, and that such an intention has been "averred here. Actual intention to hurt is a circumstance of "peculiar importance because conduct which is intended to hurt "strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. My noble and "learned friends have discussed the averments in the opinions "which they will deliver and which I have had the advantage of "reading, and they have shown that the appellant has averred "a case of actual intention to hurt, wilfully persisted in after the

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[21] [1952] A.C. 525, 551.

[22] The Times, July 10, 1953.

[23] [1951] P. 38, 46.

[24] [1952] A.C. 525.

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[25] [1952] A.C. 525, 534.

[26] 1951 S.C. 286, 294.

[27] (1895) 22 R.(H.L.) 32, 44.

[28] 1951 S.C. 286, 294.

"injury to the appellant's health was apparent to the respondent. "These averments are, in my opinion, relevant and they are, "I think, supported by sufficiently specific instances of the "respondent's alleged cruelty. I therefore agree that the action "should go to proof." As I understand Lord Normand's opinion he is saying, in effect, and indeed in terms, that the actual intention is, as he puts it, a circumstance of peculiar importance because that which is intended hurts more; but as I understand his reasoning, conduct which is the consequence of mere obtuseness or indifference may none the less be cruelty.

I turn next to a passage in the speech of Lord Merriman, who was a party to the decision. He said [29]: "I fully agree with your "Lordships that the averment of an intention on the part of the "husband to impose his will on the pursuer, and the averment "of persistence in his callous conduct although aware of its "effect on his wife's health, both of which are plainly made, "are important averments in this case. In saying this, however, "I must not be taken to suggest that either in England or in "Scotland it is essential to impute to the wrongdoer a wilful "intention to injure the aggrieved spouse in order to establish "a charge of cruelty. In *Mackenzie* v. *Mackenzie* [30] Lord "Watson said, 'I do not impute to the appellant that his "'conduct, cruel and reprehensible as it was in my estimation, "'was dictated by a wilful intention to injure the respondent.' "Likewise in *Kelly* v. *Kelly*,[31] to which I shall recur later, "because it is the leading case in England on the subject of "cruelty without physical violence, Lord Penzance, in his judg"ment in the full court, said [32]: 'He says that he does not "'desire to injure her, and it has never been asserted that he "'does.' So also in *Squire* v. *Squire*,[33] Tucker L.J., as my "noble friend then was, said that in his view the law on this "point could not be more clearly expressed than in the brief "statement quoted [34] from the judgment of Shearman J. in "*Hadden* v. *Hadden* [35]: 'I do not question . . . that he had "'no intention of being cruel . . . but . . . his intentional "'acts amounted to cruelty.' During the argument, however, "the question arose whether the averments of the husband's "intention to impose his will upon the pursuer and of persistence "in his callous conduct although aware of its effect on her

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[29] [1952] A.C. 525, 540.

[30] [1895] A.C. 384, 409.

[31] (1870) L.R. 2 P. & M. 59.

[32] Ibid. 72.

[33] [1949] P. 51, 58.

[34] Ibid. 57.

[35] The Times, December 5, 1919, p. 5, col. 3.

"*health could legitimately be supported at the proof merely by*
"*invoking the presumption that a person intends the natural*
"*and probable consequences of his acts. I deprecate the exclu-*
"*sion in advance of any particular method of proving an*
"*averment. I make this reservation because I am unable to*
"*agree with the Lord President's view* [36] *that this presumption*
"*leads to the conclusion that if injury to health occurs* '*any*'
"*conduct, however meritorious, which brings about that result*
"*would be cruelty. I have expressed my own views on this*
"*matter recently in Simpson* v. *Simpson* [37] *and I do not propose*
"*to repeat them, but I may perhaps be allowed to quote one*
"*sentence* [38]: '*Without going through the careful examination*
"'*of the doctrine in Squire* v. *Squire,* [39] *with which I respect-*
"'*fully agree, I venture to suggest that in this jurisdiction at*
"'*any rate we may continue to use the time honoured maxim,*
"'*provided always we remember that it does not express an*
"'*irrebuttable presumption of law and that it is only to be*
"'*applied in connexion with conduct which can fairly be*
"'*described as ill treatment*'—*because I coupled with it an*
"*observation of Lord Greene M.R. in Buchler* v. *Buchler,*" [40]
and then my Lord went to the question of desertion. I pause there for a moment to remind myself of the brief statement which my Lord quoted from the judgment of Shearman J. in Hadden v. *Hadden,* [41] *which met with approval in the Court of Appeal in Squire* v. *Squire,* [42] "*I do not question that he had no inten-*
"*tion of being cruel but his intentional acts amounted to*
"*cruelty.*" *This to my mind raises the very same point as that which Denning L.J. put more fully a good many years later in the passage in Kaslefsky* v. *Kaslefsky* [43] *to which I have already referred.*

I turn now to the opinion of Lord Reid. *Lord Reid, as I understand his speech, was not wholly agreed with the approach indicated by Lord Normand and by my Lord and put one passage in a slightly more reserved or guarded form. He started in these terms* [44]: "*I read the appellant's aver-*
"*ments as alleging a deliberate course of conduct intended to*
"*wound and humiliate the appellant and persisted in by the*
"*respondent although it was obvious that this was seriously*

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[36] 1951 S.C. 286, 292.
[37] [1951] P. 320.
[38] Ibid. 333.
[39] [1949] P. 51.
[40] [1947] P. 25, 45.
[41] The Times, December 5, 1919, p. 5, col. 3.
[42] [1949] P. 51.
[43] [1951] P. 38, 46.
[44] [1952] A.C. 525, 548.

"affecting the appellant's mental and physical health. It is "true that the appellant's case does not appear to have been "presented in this light to the First Division; the argument "there presented appears to have been that any conduct by one "spouse which injures the health of the other is cruelty whatever "may have been the intention of the defender. I am not "surprised that the First Division rejected this argument. But "there can hardly be a more grave matrimonial offence than to "set out on a course of conduct with the deliberate intention of "wounding and humiliating the other spouse and making his or "her life a burden and then to continue in that course of conduct "in the knowledge that it is seriously affecting his or her mental "and physical health. Such conduct may consist of a number "of acts each of which is serious in itself, but it may well be "even more effective if it consists of a long-continued series of "minor acts no one of which could be regarded as serious if "taken in isolation. Once it is established that physical violence "is not a necessary ingredient of cruelty—and I think that that "has long been recognized by the law of Scotland—then I can "see no justification in principle for requiring that the deliberate "acts of the defender must be of a certain character, and I know "of no authority which requires me to make any such distinction.

"If a case is to be remitted for proof it is very undesirable to "say anything which may embarrass the future conduct of the "case. I do not think it is necessary for the decision of this "appeal to make a detailed examination of the authorities either "in Scotland or in England, and I therefore refrain from doing so. "But to avoid misunderstanding there are some observations of "a general character which I think it is necessary to make.

"What I have said is only intended to apply when a deliberate "intention such as I have described was the cause of the "defender's conduct. Such an intention need not be proved by "direct evidence; it may be inferred from the whole facts and "atmosphere disclosed by the proof. I do not doubt that there "are many cases where cruelty can be established without it "being necessary to be satisfied by evidence that the defender "had such an intention, but I do not intend to decide anything "about such cases. If the defender did not in fact intend to "ill-treat the pursuer, I desire to reserve my opinion whether, or "to what extent, it is necessary or proper to impute an intention "which did not exist by invoking a legal presumption that every- "one must be supposed to intend or foresee the natural and "probable consequences of his acts, and I also wish to reserve "my opinion on the question whether or in what circumstances "it can be enough in such cases to prove that a series of comparatively minor incidents has caused injury to the health of "the pursuer if the defender was not guilty of deliberately "ill-treating the pursuer."

I would lay emphasis on the words used by Lord Reid, namely: "It may be inferred from the whole facts and "atmosphere disclosed by the proof." That approach was emphasized by the last opinion, that of Lord Tucker, in which he says this[45]: "Judges have always carefully refrained from "attempting a comprehensive definition of cruelty for the "purposes of matrimonial suits, and experience has shown the "wisdom of this course. It is in my view equally undesirable—"if not impossible—by judicial pronouncement to create certain "categories of acts or conduct as having or lacking the nature "or quality which render them capable or incapable in all "circumstances of amounting to cruelty in cases where no "physical violence is averred.

"Every such act must be judged in relation to its attendant "circumstances, and the physical or mental condition or "susceptibilities of the innocent spouse, the intention of the "offending spouse and the offender's knowledge of the actual or "probable effect of his conduct on the other's health (to borrow "from the language of Lord Keith[46]) are all matters which may "be decisive in determining on which side of the line a particular "act or course of conduct lies.

"For this reason I agree with Lord Keith[47] that it is, "generally speaking, not possible 'to compartment acts for "'purposes of relevancy as being gross, so as to constitute "'cruelty, or less gross, so as not to constitute cruelty,' though "there may be extreme cases where the acts in themselves are "so trivial as to justify dismissal of an action for lack of "relevance without proof. It is with regard to the sufficiency "of the facts and matters relied on as amounting in the aggregate "to cruelty that I think consistorial causes are so different from "many other types of action, though I agree with counsel for "the respondent that it would be wrong to say that no such "suit could ever fail for lack of relevance." I should perhaps add that the observations which he borrowed from Lord Keith

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[45] [1952] A.C. 525, 550.

[46] 1951 S.C. 286, 300.

[47] Ibid. 299.

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were given by Lord Keith in his dissenting judgment in the Inner House of Appeal in Scotland.

It is, I think, quite vital in a case of this kind to try to escape from any tendency to do what Lord Keith described [47] as an attempt to compartment acts for the purposes of relevancy. One of the difficulties, as I understand the justices' reasons here, is that in a praiseworthy effort to get to the bottom of this case they divided up, or detached from each other, the complaint by the wife of the indecent assault on the child from the two physical assaults, which were separated by seven years, perpetrated by the husband on the wife. Any such approach is, I think, dangerous and almost certainly wrong. It is essential, as Lord Tucker pointed out,[48] to judge every act in relation to its attendant circumstances, the condition or susceptibilities of an innocent spouse, the intention of the offending spouse, and no less the offender's knowledge of the actual or probable effect of his conduct on the other's health.

I have already mentioned my own view as to the probability of an indecent assault on a child of the marriage outraging, to put it no higher, the normal instincts of a decent mother; and I doubt not that any man of ordinary intellectual capabilities must have known, if he paused to reflect, that an act of that kind, assuming always it was discovered by the mother or brought to her notice, would be a dreadful blow to her normal susceptibilities. But in this particular case the pattern is somewhat more complicated, as I have indicated, because on the very day, as I understand the evidence, that the indecent assault took place, it was followed by what the wife complains of as a serious assault, but which the justices have found was perhaps less serious than the wife made out. But the two serious incidents, coming so close together, and following on much less serious matter concerning the rudeness to guests, must be taken together to form a composite picture by which alone can be ascertained whether the acts of one spouse on another can, judged in relation to all the surrounding circumstances, be found to be cruelty or not to amount to cruelty.

I do not propose to say anything further on the question of cruelty, and what I have said so far has been said not only to show where I think the justices went wrong but in the hope that perhaps what I have said, or some of it, may be of some assistance on some future occasion, because in my view this is a case which must go back to the justices or a fresh panel of the same justices for a re-hearing in order that they may apply their minds afresh to what I think is the law.

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[47] 1951 S.C. 286, 299.

[48] [1952] A.C. 525, 550.

So far as the charge of desertion is concerned, I propose to say extremely little about it, because in my view, although, as I have indicated, the charges of cruelty and desertion may to some extent hang together, I think it is right that the charge of desertion should go back with the charge of cruelty and that they should be re-heard together before a fresh panel of justices.

Lord Merriman P. I agree. In view of the complete summary of the facts which my brother has given, I am absolved from attempting to recapitulate them; and in view of the fact that I concur in his view that this case must go back as a whole for re-hearing, I will only add comparatively few words out of deference to the justices, who obviously took trouble and from whom we are differing and, may I add, with a recognition of the great obligation we owe to counsel for the very careful and admirable way in which this case has been put before us.

To deal first with the issue of cruelty: it is really not disputed that the true effect of the decisions in *Thompson* v. *Thompson*,[49] *Bosworthick* v. *Bosworthick*,[50] and *Boyd* v. *Boyd*,[51] which my brother has already summarized, is to afford authority for the proposition that sexual offences against third parties which, if I may borrow a phrase from my own judgment in *Simpson* v. *Simpson*,[52] are "directly relevant to the husband's "conjugal obligations," may be cruelty to the wife. It is true that *Thompson* v. *Thompson*[53] and *Bosworthick* v. *Bosworthick*[54] were decided long before the formula that conduct, in order to amount to cruelty, must be "aimed at" the petitioner, had apparently been reduced to an absolute rule of law to be applied in all circumstances. Nevertheless, as my brother has pointed out, those cases, undefended as they were, were decided by very learned judges, as the Times Law Reports in each case show, upon a very careful consideration of submissions by counsel of unrivalled experience in the divorce jurisdiction. The same cannot be said, as regards the long standing at any rate, of *Boyd* v. *Boyd*,[55] which was decided in 1938, but it was the judgment of Bucknill J., who has been one of the exponents of the doctrine to which I have just alluded, if, indeed, he was not the originator of it in *Horton* v. *Horton*.[56]

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[49] 17 T.L.R. 572.
[50] 18 T.L.R. 104.
[51] Post, 126.
[52] [1951] P. 320, 333.
[53] 17 T.L.R. 572.
[54] 18 T.L.R. 104.
[55] Post, 126.

But Mr. Coplestone-Boughey, in his admirable argument, sought to distinguish those cases from the present on the ground that they all have a common feature which is not present to this case, namely, that the offences, or offences ejusdem generis, were repeated after the unfavourable reaction of the petitioner to the first offence was known to the respondent and, therefore, that the later offence was " aimed at " the petitioner. However that may be, I venture to think that to hold that an indecent assault committed, in the matrimonial home, upon the daughter of the marriage aged nine, is " aimed at " the wife, if that is the proper test, requires only the exercise of a little common sense, and I do not think that so to hold conflicts with what Denning L.J. is reported as saying in *Kaslefsky* v. *Kaslefsky*[57] in the passage which my brother has already read, still less that it conflicts in any degree with what was said by more than one of the noble Lords who dealt with *Jamieson* v. *Jamieson*.[58] Manifestly, as my brother has already pointed out, the point becomes even clearer when within a very short space of time the offence in question is coupled with a physical assault upon the wife herself.

In the course of the argument we were referred to cases in which the propriety of the original decision in *Boyd* v. *Boyd*,[59] when Bucknill J. dismissed the charge of desertion, has been considered, including, amongst others, my own judgment in *Simpson* v. *Simpson*,[60] a decision of this court composed as it now is. As I have expressly adhered to that judgment when sitting in the House of Lords in *Jamieson* v. *Jamieson*,[61] it is neither necessary, nor would it be becoming, to say more than that I repeat here my adherence to that judgment, and to add that the reasoning of that judgment is not answered, as it was in *Bartholomew* v. *Bartholomew*[62] decided in the Court of Appeal many months after the decision in *Jamieson* v. *Jamieson*,[63] by the statement[64] that Bucknill L.J. had been a party to the decision in *Hosegood* v. *Hosegood*.[65]

I am also entitled to point out, following what my brother has said, that in more than one of the recent cases in which

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[56] [1940] P. 187.
[57] [1951] P. 38, 46.
[58] [1952] A.C. 525.
[59] Post, 126.
[60] [1951] P. 320, 331.
[61] [1952] A.C. 525, 541.
[62] [1952] W.N. 535; [1952] 2 T.L.R. 934.
[63] [1952] A.C. 525.
[64] [1952] 2 T.L.R. 934, 939.
[65] (1950) 66 T.L.R. (Pt. 1) 735.

Boyd v. *Boyd* [66] has been followed, expressly or by implication, the decision in *Jamieson* v. *Jamieson* [67] is treated as laying down that intention to injure is an essential averment in cruelty. That is not the case. It is true that in what Lord Keith, who dissented in the Inner House, described as "perhaps thin averments," and Lord Normand described as a "doubtful case," all the noble Lords who decided the case of *Jamieson* v. *Jamieson* [67] agreed with Lord Keith that the averment that the course of conduct complained of was inspired by the intention on the part of the husband to impose his will on the wife without consideration for her feelings or health was an important averment in the circumstances of the case, but that is not the same thing as holding that it was an "essential" averment in a charge of cruelty generally, or even in the particular case. It is also true that in declining to discuss how that averment might be proved, Lord Reid, in the passage which has been referred to,[68] reserved his opinion whether reliance can be placed on any presumption of the husband being supposed to intend the natural and probable consequences of his own acts. He was alone in that reservation. Neither Lord Normand, nor Lord Tucker, who had delivered the principal judgment in *Squire* v. *Squire*,[69] dealt with the point at all, while, as I have already said, I adhered to my opinion, expressed in *Simpson* v. *Simpson*,[70] that *Squire* v. *Squire* [71] was rightly decided. It is proper to add, however, that in *King* v. *King* [72] Lord Reid repeated, in substance, the same reservation.

In this case, the validity of the application of the presumption, which we all know is not an irrebuttable presumption, may be academic for, as my brother has already explained, in the letters which were written by the husband while awaiting trial for the indecent assault, in one view of them he appeared to recognize quite plainly that it is the natural if not the inevitable effect of his conduct that there can be no question of forgiveness on the part of the wife. It is right to say also that it is a possible view of those letters, from another aspect, that the husband, recognizing the effect that his conduct has had on the wife, is offering her a consensual separation. If that view is correct, and the wife accepted the separation in that sense, there would be some evidence to support the justices' findings that the true effect of the facts here is that there was a consensual separation.

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[66] Post, 126.
[67] [1952] A.C. 525.
[68] Ibid. 549.
[69] [1949] P. 51.
[70] [1951] P. 320.
[71] [1949] P. 51.
[72] [1953] A.C. 124, 140.

Let it be understood that I am not to be taken as expressing my opinion that that is the correct view. But if I am right in thinking with my brother that the husband has himself provided the evidence in those letters that the natural and inevitable effect of his conduct was to endanger the wife's mental health (and in saying that I am referring to one passage which I do not think my brother actually read but which might be worth reading: "I am very worried about you, and hope you have been able to "pull yourself together. Let this thing be a passing memory. "Take real good care, no illness or breakdown. Keep your health "good, and please smile again"), if those words, in a letter which purports to express his feelings, really represent his view of the probable or the possible consequences of what has been done, on any view of the matter it would seem that there is no obstacle to a finding of cruelty with the implied intention of injuring the wife.

However, I agree with my brother that on either view of the correspondence it may very well be that the issue of desertion is academic because, as I have already said, I also agree that on the re-hearing, based on what I think is plain misdirection of themselves on the issue of cruelty, the whole case must be open on both complaints, persistent cruelty and desertion.

The result is that the appeal will be allowed, the order dismissing the wife's complaints on both issues will be set aside, and her complaints remitted for a re-hearing by a fresh panel of the justices for the petty sessional division of the borough of Croydon.

Appeal allowed.
Case remitted for re-hearing.
Leave to appeal.

Solicitors: *Copley, Singleton & Billson, Croydon; Sharpe, Pritchard & Co., for E. C. Francis, Chester.*

J. B. G.

NOTE.

BOYD v. BOYD.

1938
Oct. 14.

Bucknill J.

Undefended petition for divorce by wife on the ground of (constructive) desertion.

The parties were married in April, 1923; the husband was at that time a widower with five children of his previous marriage, two of whom were daughters. In November, 1926, the husband was convicted of incest with a daughter by his previous marriage. On his discharge in 1930 the wife forgave him and they lived together until 1933, when the husband was convicted of indecently assaulting a girl aged 12 years. After being discharged the husband, in January, 1935, asked the wife to live with him again, but she refused.

The wife gave evidence of the shock which she had suffered as a result of her husband's conviction and of the injury to her health which she had sustained.

John Latey, for the wife, submitted that the husband's conduct had virtually made it impossible for the wife to live with him. It was true that to establish constructive desertion there must be shown on the part of the deserter an intention to bring the cohabitation to an end. But the intention in such cases was in the wide sense that a person was presumed to know and intend the natural consequences of his act. [He referred to *Bosworthick* v. *Bosworthick* [1] and *Thompson* v. *Thompson*.[2]]

BUCKNILL J. This is a very difficult and a very sad case. I think that I ought to state my conclusions on the petition as it stands at the moment.

The wife was married on April 29, 1923, to Charles Boyd, who was a widower. A child was born of the marriage in August, 1925.

In 1926 the husband was convicted of the crime of incest with one of his daughters by the first marriage and was sentenced to five years' penal servitude. When he came out of prison after serving his sentence the wife forgave him and took him back to live with her and, of course, thereby condoned the adultery in respect of which she could then have obtained a decree. The husband did nothing to support her, but she continued to live with him until, in 1933, he was convicted of an indecent assault on a girl under 13 years of age and was sentenced to 20 months' imprisonment with hard labour. That was a terrible shock to the wife and endangered her health. When he came out in 1935 after serving his sentence he came back to see her and in effect asked to be taken back again. The wife felt that she could not trust him again and refused to have anything more to do with him.

By the Matrimonial Causes Act, 1937, a decree of divorce can be obtained if the husband has deserted the wife without cause for a period of at least three years immediately preceding the presentation of the petition. The petition in this case, as filed, charges the husband with desertion for a period of at least three years immediately preceding the presentation of the petition, which takes one back to the time he came out of prison for the second offence.

Mr. Latey, who cited *Bosworthick* v. *Bosworthick* [3] and *Thompson* v. *Thompson*,[4] contends that this is a case of constructive desertion. He says that, in effect, the husband has behaved in such a way that his wife cannot be expected to live with him any longer.

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[1] (1901) 18 T.L.R. 104; 86 L.T. 121.

[2] (1901) 17 T.L.R. 572; 85 L.T. 172.

[3] 18 T.L.R. 104.

[4] 17 T.L.R. 572.

It seems to me that the essential element of desertion must be an intention to bring the cohabitation to an end. It may be that a husband behaves so badly that his wife leaves him, and it may be that his conduct amounts to cruelty and the wife can get a divorce on that ground. But before it can be said that there is a case of constructive desertion the court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive the wife away. There must be, on the part of the person against whom desertion is alleged, an intention to bring the cohabitation to an end. There is no evidence here of any such intention. The man seems to be a sexual pervert who is unable to control himself, but there is no evidence that he has at any time ceased to wish to live with his wife; it was his wife, on the other hand, who refused to live with him. It seems to me to be quite clear, therefore, that no case of constructive desertion has been made out.

Mr. Latey has asked me to adjourn the petition in order that he may consider whether he should amend the petition and include the charge of cruelty. That being so I merely state my findings on the petition as it now is and adjourn the final consideration for that purpose.

[The case was adjourned accordingly for amendment, and an order was made for substituted service by advertisement.]

1939, May 18. *John Latey* for the wife. This is a case which your Lordship tried last October. If I may bring the short point to your Lordship's recollection, it is a case in which the wife sued for divorce on the ground of constructive desertion, the desertion taking the form of the husband having been convicted of two grave sexual offences which caused her considerable upset. [He referred to the report in the Times Law Reports and read the headnote,[5] and informed the court of the amendment to the petition and the re-service.] The wife could reinforce to some small extent the evidence she has already given in regard to the cruelty, that is to say, as to it affecting her health, her constant fear of her husband. But perhaps your Lordship could on your own finding there find that the husband had been guilty of cruelty which entitled her to a decree of divorce. Your Lordship did find—

Bucknill J. Danger to her health?

Latey. Yes, my Lord.

Bucknill J. Is there any authority on the matter?

Latey. Yes. *Bosworthick* v. *Bosworthick.*[6] Your Lordship will see from that decision that in very similar circumstances the court held

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[5] (1938) 55 T.L.R. 3: "After the "husband had been convicted of a "sexual offence the wife refused to "resume cohabitation with him and "presented a petition for divorce "alleging that he had constructively "deserted her:—

"*Held*, that before a case of con-"structive desertion could be made "out the court must be satisfied that "the conduct of the respondent was "such as to show a clear intention to "drive the petitioner away. Although "the husband seemed to be a sexual "pervert, unable to control himself, "there was no evidence that he had "at any time ceased to wish to live "with his wife, nor of any intention "on his part to bring the cohabitation "to an end."

[6] 18 T.L.R. 104.

1938

BOYD *v.* BOYD.

cruelty and granted a decree of judicial separation. In *Thompson* v. *Thompson*,[7] which is even stronger, before Sir Francis Jeune P.—

BUCKNILL J. I think that I can act on the evidence.

Latey. Then I ask for a decree nisi.

BUCKNILL J. There will be a decree nisi with costs and custody.

Decree nisi.

Solicitors: *S. A. Bailey & Co.*

J. B. G.

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[7] 17 T.L.R. 572.

IVENS *v.* IVENS.

C. A.

1954 *Oct.* 26.

Lord Goddard C.J., Hodson L.J. and Vaisey J.

Husband and Wife—Divorce—Cruelty—Intention to injure—Offence against third party—Indecent assault on stepdaughter by husband —Injury to wife's health—Conduct "aimed at" wife.

A husband, respondent to divorce proceedings by his wife on the ground of cruelty, had committed indecent assaults on the wife's daughter by a previous marriage, a child between 13 and 15 years of age. The girl informed her mother, who protested to her husband concerning his conduct and he promised not to repeat it. He failed to keep his promise and resumed his indecent conduct, with the result that his wife's health was affected. Eventually the husband left the house and the wife presented her petition:—

Held, that a criminal and indecent assault by a husband on a child might amount to cruelty to the child's mother although no intention to injure the mother was shown. In the present case the husband must have known what the effect of his conduct would be on his wife and on her state of health and yet, careless and indifferent to what the effect would be, he continued with his indecent conduct. The facts proved constituted a strong case of cruelty and the wife was entitled to a decree.

Cooper v. *Cooper* [1953] 3 W.L.R. 867 applied.

Decision of Judge Gerwyn Thomas reversed.

APPEAL from a decision of Judge Gerwyn Thomas sitting as a special commissioner, dismissing a wife's petition for divorce on the ground of cruelty.

The parties were married in December, 1941, the wife at that time being a widow with two grown-up sons and a daughter, who at the material time was between 13 and 15 years of age. After a time the husband began a course of indecent conduct with his step-daughter, of which she complained to her mother. Her story, which was accepted by the commissioner, was corroborated by the wife, by the girl's brother, and by admissions made by

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the husband himself. There were quarrels between the parties and the husband promised not to repeat his conduct with his stepdaughter, but failed to keep his promise. Eventually one of the wife's sons, who was in the Royal Air Force, was called home, and between them they turned the husband out of the house. Medical evidence was given that the wife's health had suffered as the result of the husband's conduct.

The commissioner dismissed the petition on the ground that the cruelty alleged against the husband was not aimed at the wife. The wife appealed.

Geoffrey C. Tyndale Q.C. and *John Davies* for the wife. The decision of the commissioner was wrong. He followed the decision in *Daniell* v. *Daniell*,[1] and dismissed the wife's petition on the ground that the conduct of the husband, which constituted the cruelty alleged, was not aimed at his wife. On the facts of the present case, however, the husband must be assumed to have intended the natural consequences of his acts which were that, when the wife became aware of his conduct, she would be affected thereby, as it was established that she was. The present case, on its facts, cannot be distinguished from the recent case of *Cooper* v. *Cooper*,[2] and the husband's conduct here must be taken to have been aimed at the wife and, therefore, to have been intended to injure her health which, in fact, it was proved to have done. That being so, it is submitted that a clear case of cruelty is established and the appeal should be allowed.

The husband did not appear and was not represented.

LORD GODDARD C.J., after stating the facts, continued: The commissioner refused to hold that the facts alleged amounted to evidence of cruelty because, he said, the cruelty was not aimed at the wife. In coming to that decision I think that he probably had in mind the decision in *Daniell* v. *Daniell*.[1] That was a case in which a woman who was a State Registered Nurse married a man who had children by a previous marriage. The father seems to have been a somewhat stern parent who corrected the children, and on occasion gave them whippings. There is nothing in the report of the case to suggest that the whippings were of an excessive or brutal character in the sense that the father could have been prosecuted for occasioning actual bodily harm to the children, or anything of that kind. In that case the wife was

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[1] The Times, February 2, 1954.
[2] [1954] 3 W.L.R. 867.

[1] The Times, February 2, 1954.

not the mother of the children, but possibly, having very high-minded ideas and views about the correction or chastisement of children, she seems to have objected to any corporal punishment being inflicted on them at all. In those circumstances the court refused to hold that what was done amounted to cruelty to the wife, taking the view that the husband was justified in chastising his children so long as he did not do it in an unreasonable or brutal fashion. The court held that the man was not doing what he did with the object of injuring his wife; she might have objected to it, but that is quite another matter.

In the present case, however, the husband was carrying on an indecent course of conduct towards the wife's own daughter, and committing indecent assaults upon the child: when she protested, after quarrels between them, he promised not to do it again, and then repeated the offence. That is a very different state of affairs from the facts in *Daniell* v. *Daniell*.[2]

I think that the present case falls exactly within the decision in *Cooper* v. *Cooper*,[3] decided in the Divisional Court before Lord Merriman P. and Karminski J. There the court held that a criminal and indecent assault by a father on his child might amount to cruelty to the mother, although no intention to injure her was shown. In delivering the first judgment Karminski J. reviewed all the cases on the subject, beginning with *Thompson* v. *Thompson*[4] in 1901, where the husband debauched the servants in the matrimonial home. In 1901 it was, of course, necessary to prove both cruelty or desertion as well as adultery, and in that case the husband's conduct was held to constitute cruelty to the wife. Karminski J. then referred to *Bosworthick* v. *Bosworthick*[5] also in 1901, where it was held that indecent assaults on little girls, for which the husband had been sentenced to imprisonment, amounted to cruelty to the wife.

Coming down to later times, Karminski J. cited *Boyd* v. *Boyd*,[6] where Bucknill J. held that an indecent assault on a young girl had not amounted to constructive desertion, but granted a decree on the ground of cruelty arising from the same offence. Karminski J. next referred to *Kaslefsky* v. *Kaslefsky*,[7] a judgment of Denning L.J., in which he said such an intention (i.e., to injure) "may readily be inferred from the fact "that it is the natural consequence of the conduct, especially

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[2] The Times, February 2, 1954.

[3] [1954] 3 W.L.R. 867.

[4] (1901) 17 T.L.R. 572.

[5] (1901) 18 T.L.R. 104.

[6] Ante, 126; 55 T.L.R. 3; [1938] 4 All E.R. 181.

[7] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

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"when the one knows, or it has been brought to his notice, what "the consequences will be, and nevertheless he does it, careless "or indifferent whether it distresses his wife or not."

In the present case what could be worse conduct towards the wife, the mother of this child, than that her husband should be carrying on an indecent course of conduct and indecent practices with her daughter, which the child resented? I can imagine nothing which would be more likely to affect the woman's health, as in fact it did, and I can conceive of no conduct more calculated to justify the court in saying that the husband knew perfectly well what the effect of his conduct would be upon his wife and upon the state of her health, and yet, careless of or indifferent to what the effect would be, continued to carry on this filthy conduct.

I think that *Daniell* v. *Daniell*[8] is no authority for saying that acts of this nature to the child could not be cruelty towards the child's mother. In my judgment, there was on the facts proved here a strong case of cruelty made out, and the wife is entitled to a decree.

HODSON L.J. I agree. In his very careful judgment the commissioner obviously accepted the wife's evidence and that of the child who had been indecently assaulted by the husband; but he felt some difficulty because he thought that the husband's misconduct was directed not against the wife but against the wife's child, from which he inferred that it must necessarily follow that it could not constitute cruelty to the wife because of what was said in *Daniell* v. *Daniell*[9] to which my Lord has referred.

The commissioner summarized his conclusion in this way: "I do not find that he did it"—that is, the indecent conduct—"to hurt his wife; it was to satisfy his own unnatural, reprehensible feelings." That is perfectly true so far as it goes, but I do not think that it goes far enough. This man's conduct was, it is true, directed against the daughter; but with the daughter living in the mother's house, knowledge of his conduct was bound in the circumstances to come to his wife, as it did. The wife then protested to the husband; he promised not to do it again; he did it again, and the wife's health was not only likely to be injured but was in fact injured. When the husband was eventually turned out of the house by one of the sons, the wife went to see a doctor who found her in a bad state of health which, in his opinion, would properly be attributed to the complaints which she had made against her husband. In my judgment, this appeal ought to succeed.

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[8] The Times, February 2, 1954.

[9] Ibid.

VAISEY J. I agree with all that my Lords have said, and with their conclusion that the wife's appeal in this case must be allowed. The indecent conduct of the husband towards the wife's own daughter was, as the commissioner found, not done in order to hurt the wife, but it had that consequence, as the evidence quite clearly shows, and as the husband must have known that it would or might. In my judgment, that is quite sufficient to establish the wife's right to a decree.

Appeal allowed.
Decree nisi pronounced.

Solicitors: *Kinch & Richardson for L. B. Fagot & Tillyard, Cardiff.*

P. B. D.

[HIGH COURT OF CHIVALRY.]

1954
Dec. 21.
1955
Jan. 21.

The Duke of Norfolk, Earl Marshal, Lord Goddard D.C.L. (sitting as Assessor and Surrogate).

MANCHESTER CORPORATION *v.* MANCHESTER PALACE OF VARIETIES LD.

Court of Chivalry—Jurisdiction—Existence—Jurisdiction in matters relating to armorial bearings—Right to bear arms a dignity not cognizable by the common law—Jurisdiction of court in complaints relating to usurpation of armorial bearings—Use of arms of city on common seal of company—Display of arms of city in theatre—Use of arms on common seal legitimate cause of complaint—Display of arms as decoration not a ground for intervention—8 *Ric.* 2, *c.* 5—13 *Ric.* 2, *st.* 1, *c.* 2.

The jurisdiction of the court of chivalry in matters relating to armorial bearings, as evidenced by the records of the court and the communis opinio among lawyers, is still extant. The statutes 8 Ric. 2, c. 5 and 13 Ric. 2, c. 2 were intended to confine the court to matters of dignity and arms and to prevent it from entertaining matters cognizable by the ordinary courts of the kingdom, but, since the right to bear arms is a dignity and not property within the true sense of the term, and is not a matter cognizable by the common law, the court of chivalry has jurisdiction to deal with complaints relating to the usurpation of armorial bearings. That jurisdiction, however, should be exercised only when there is some substantial reason, for practices and usages which have prevailed for many years must be taken into account and armorial bearings have been widely used as a decoration or embellishment without complaint, and it would not be right nowadays for the court to be put in motion merely because arms were displayed by way of decoration or embellishment.

Where, therefore, the Corporation of Manchester alleged and complained that the defendants, the Manchester Palace of Varieties Ld., had over a period of years usurped the achievement granted to the corporation by displaying a representation of the corporation's arms on the pelmet above the main curtain in the auditorium of the Palace Theatre, Manchester, and by using them as their common seal, and the defendants, whilst admitting the allegations, denied that the matter was within the jurisdiction of the court:—

Held, (1) that the court had jurisdiction;

(2) that, though it was doubtful whether the display of the arms in the auditorium of the theatre was alone a ground for intervention by the court, the corporation of a great city could properly object to their arms being used on any seal but their own, for a deed sealed with an armorial device was thereby authenticated as the act and deed of the person entitled to the arms. The use of the arms of the city on the defendants' seal looked like an attempt to identify themselves with the corporation of the city, and was a legitimate subject of complaint, and therefore, the court could properly inhibit and enjoin the defendants from any display of the corporation's arms.

Observations on desirability of statutory regulation of the proceedings of the court.

CAUSE OF INSTANCE.*

The plaintiffs, the Manchester Corporation, were incorporated by Royal Charter dated October 23, 1838, and on March 1, 1842, were granted and assigned by the then Garter Principal King of Arms, the then Clarenceux King of Arms and the then Norroy

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* *Reporter's note.*—Officers of Arms (Chester, York, Somerset and Lancaster, Heralds, and Bluemantle and Rouge Dragon, Pursuivants) were in attendance on the court. Before the proceedings began the Earl Marshal's style was proclaimed and letters patent of James I of August 1, 1622, and Charles II of October 19, 1672, were read, followed by the reading of the instrument of appointment of Lord Goddard as lieutenant, assessor and surrogate, and that appointing the joint registers. The Earl Marshal, the lieutenant, assessor and surrogate, and the joint registers then made declarations of office, and the case was called. The hearing took place in the Lord Chief Justice of England's Court in the Royal Courts of Justice and not, as stated in the citation (infra), in the Hall of the College of Arms.

King of Arms the following arms: Gules, three bendlets enhanced or, a chief argent, thereon on waves of the sea a ship under sail proper; and for the crest, on a wreath of the colours, a terrestrial globe semée of bees volant all proper, together with the motto "Concilio et labore," to be borne and used for ever thereafter by the Mayor, Aldermen and Burgesses of the Borough of Manchester and their successors on seals, shields, banners or otherwise according to the laws of arms. On March 2, 1842, the Garter Principal King of Arms granted and assigned to the plaintiffs the supporters following: On the dexter side, an heraldic antelope argent, attired, collared and chain reflexed over the back or, and on the sinister side a lion guardant or, murally crowned gules, each charged on the shoulder with a rose of the last, to be borne and used for ever thereafter by the Mayor, Aldermen and Burgesses of the Borough of Manchester and their successors on seals, shields, banners or otherwise according to the laws of arms. By Royal Charter, dated March 29, 1853, the plaintiffs were constituted a city and by Royal Warrant dated August 3, 1893, the chief magistrate of the city was authorized to assume and use the style, title and appellation of Lord Mayor of Manchester.

From May, 1953, to April, 1954, the defendants, Manchester Palace of Varieties Ld., the occupiers of the Palace Theatre, Manchester, a building open to the public, publicly displayed representations of the plaintiffs' armorial bearings on a pelmet above the main curtain in the auditorium of the theatre and also on their common seal. On April 13, 1954, the plaintiffs, by their town clerk, wrote requesting the defendants to cease the display of the representations of their armorial bearings; on April 21, 1954, the defendants wrote to the plaintiffs stating that they did not admit the plaintiffs' right to require them to cease the display, and that they did not propose to do so.

On May 5, 1954, the plaintiffs petitioned the Earl Marshal[1] that process might be awarded, complaining that the display of

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[1] "To the Most Noble Bernard Marmaduke, Duke of Norfolk, Knight of "the Most Noble Order of the Garter, Knight Grand Cross of the Royal "Victorian Order, Earl Marshal and Hereditary Marshal of England, and "one of Her Majesty's Most Honourable Privy Council.

"The Humble Petition of the Lord Mayor, Aldermen and Citizens of the "City of Manchester.

"Sheweth:

"1. That your petitioners are a body corporate and lawfully bear for arms: "gules, three bendlets enhanced or, a chief argent, thereon on waves of the "sea a ship under sail proper, and for crest: on a wreath of the colours, a representations of their armorial bearings by the defendants was without their leave or licence and contrary to their will, and that the defendants continued and threatened to continue the display, whereby they were greatly disparaged. On October 20, 1954, the citation was issued.

"terrestrial globe semée of bees volant all proper, and for supporters: on the "dexter side, an heraldic antelope argent, attired, collared and chain reflexed "over the back or, and on the sinister side, a lion guardant or, murally "crowned gules, each charged on the shoulder with a rose of the last.

"2. That Manchester Palace of Varieties Limited whose registered office is "at the Palace Theatre, Whitworth Street, in the City of Manchester (hereinafter referred to as 'the company'), are the occupiers of a certain building "known as the Palace Theatre, Whitworth Street, aforesaid, open to members "of the public and therein display and have displayed publicly on a pelmet "above the main curtain in the auditorium without the leave or licence and "contrary to the will of your petitioners representations of the said arms, "crest and supporters or of arms, crest and supporters differing from the said "arms, crest and supporters in no material respect, contrary to the laws and "usages of arms.

"3. That the company display and have displayed upon their common "seal without the leave and licence and contrary to the will of your petitioners "representations of the said arms, crest and supporters or of arms, crest and "supporters differing from the said arms, crest and supporters in no material "respect, contrary to the laws and usages of arms.

"4. That notwithstanding your petitioners' request to cease the display of "the said representations of arms, crest and supporters as aforesaid the "company have continued and threaten to continue the display thereof, "whereby your petitioners are greatly disparaged.

"WHEREFORE YOUR PETITIONERS HUMBLY PRAY that your "Grace may be pleased to award process against the company to appear and "answer the premises in Your Grace's High Court of Chivalry or Court "Military and that thereupon such course may be taken for your petitioners' "reparation as Your Grace shall think fit.

"And your petitioners will ever pray, etc.

"Dated this fifth day of May, one thousand nine hundred and fifty-four.

L. S.

"Let Process be issued as is desired."

(Sgd.) NORFOLK, E.M.

"The Most Noble Bernard Marmaduke, Duke of Norfolk, Knight of the "Most Noble Order of the Garter, Knight Grand Cross of the Royal Victorian "Order, Earl Marshal and Hereditary Marshal of England, and One of Her "Majesty's Most Honourable Privy Council.

"To all and singular justices of the peace, sheriffs, bailiffs, constables, "officers and other faithful subjects of the Queen's Majesty, greeting:

"WE HEREBY COMMAND YOU to cite or cause to be cited peremptorily "by such ways and means so as in all probability the party to be cited may "come to the knowledge thereof Manchester Palace of Varieties Limited, "whose registered office is at the Palace Theatre, Whitworth Street, in the "City of Manchester, that they enter an appearance in the registry of our "High Court of Chivalry or Court Military situate at the College of Arms, "Queen Victoria Street in the City of London within fifteen days after service "hereof and that they appear before Us or Our Lieutenant or other Judge

By their libel the plaintiffs propounded by way of complaint in law that the defendants had in the Palace Theatre publicly before many worthy persons displayed on the pelmet above the main curtain in the auditorium without the leave or licence and contrary to the will of the plaintiffs representations of the plaintiffs' arms, crest, motto and supporters, or of one or more of them, or of arms, crest, motto and supporters differing from their arms, crest, motto and supporters in no material respect, contrary to the laws and usages of arms, and had displayed similar armorial bearings upon their common seal; that the facts and allegations [as set out above] were true, public and notorious, and thereof there was, and continued to be, a public voice, fame and report. The plaintiffs prayed for right and justice, and that the defendants might be compelled to make to them full satisfaction and restitution of their honour and that they might be condemned in the costs of the suit incurred by the plaintiffs and condemned to whatever further might be requisite according to the laws and customs of arms and of the court by the definitive sentence of the Earl Marshal. The plaintiffs propounded the

" lawfully constituted in our said court to be holden in the Hall of the College " of Arms aforesaid on the next court day thereafter to answer a complaint by " the Lord Mayor, Aldermen and Citizens of the City of Manchester (herein- " after called 'the plaintiffs') that the said Manchester Palace of Varieties " Limited have in a certain building known as the Palace Theatre, Whitworth " Street aforesaid displayed publicly on a pelmet above the main curtain in " the auditorium without the leave or licence and contrary to the will of the " plaintiffs representations of the arms, crest and supporters lawfully borne " by the plaintiffs or of arms, crests and supporters differing from the said " arms, crest and supporters in no material respect, contrary to the laws and " usages of arms, and to show good and sufficient cause why such course " should not be taken for the plaintiffs' reparation as to Us shall seem meet

" AND that you certify to Us or Our Lieutenant or other Judge lawfully " constituted with these presents what you have done in the premises.

" DATED the 20th day of October in the third year of the reign of Our " Sovereign Lady Elizabeth the Second, by the Grace of God, of the United " Kingdom of Great Britain and Northern Ireland and of Her Other Realms " and Territories Queen. Head of the Commonwealth, Defender of the Faith, " and in the year of Our Lord one thousand nine hundred and fifty-four.

" L.S. " (Sgd.) NORFOLK,
" E.M."

" I, the undersigned, hereby certify that this citation was duly executed by " me on the 25th day of October one thousand nine hundred and fifty-four by " showing the same to one William Bolton Esq., M.B.E., Solicitor of Messrs. " Boote, Edgar and Co., the solicitors for the Manchester Palace of Varieties " Limited and leaving with him a true copy thereof at his office, 53 Spring " Gardens in the City of Manchester.

" (Sgd.) FELIX E. CROWDER,
" Solicitor."

premises jointly and severally not binding themselves to the burden of superfluous proof and saving to themselves the benefit of the law in all things.

By their answer the defendants admitted that they had displayed a representation of the plaintiffs' arms, crest, motto and supporters at the Palace Theatre and upon their common seal, but denied that such display was contrary to the law, usages or customs of arms, or that the armorial bearings in question might not be displayed in the manner complained of without the leave or licence of the plaintiffs. They made no admission as to whether the display was contrary to the will of the plaintiffs, but alleged that the armorial bearings had been displayed by them at the Palace Theatre for upwards of 20 years, and upon their common seal for 60 years or more, and that, until the town clerk's letter of April 13, 1954, no complaint with regard to such display had been made by the plaintiffs, nor by the Kings of Arms. They further denied that the allegations propounded by the plaintiffs by way of complaint in law were true public and notorious.

The defendants contended that the matter did not fall within the jurisdiction of the court as defined by the statutes of 8 Ric. 2, c. 5, and 13 Ric. 2, st. 1, c. 2,[2] and that, albeit relating to the display of armorial bearings, it was not a matter in respect of which the court could or ought to exercise jurisdiction, save to

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[2] 8 Ric. 2, c. 5 (1384): "And because divers pleas concerning the common "law, and which by the common law ought to be examined and discussed, are "of late drawn before the constable and marshal of England, to the great "damage and disquietness of the people; it is agreed and ordained, that "all pleas and suits touching the common law, and which ought to be "examined and discussed at the common law, shall not hereafter be drawn "or holden by any means before the foresaid constable and marshal, but that "the court of the same constable and marshal shall have that which belongeth "to the same court, and that the common law shall be executed and used, "and have that which to it belongeth, and the same shall be executed and "used as it was accustomed to be used in the time of King Edward."

13 Ric. 2, st. 1, c. 2 (1389): " . . . because that the commons do make a "grievous complaint, that the court of the constable and the marshal hath "encroached to him, and daily doth encroach contracts, covenants, trespasses, "debts, and detinues, and many other actions pleadable at the common law, in "great prejudice of the King and of his courts, and to the great grievance and "oppression of the people; our Lord the King . . . hath declared in this parliament . . . the power and jurisdiction of the said constable, in the form that "followeth: To the constable it pertaineth to have cognizance of contracts "touching deeds of arms and of war out of the realm, and also of things that "touch war within the realm, which cannot be determined nor discussed by "the common law, with other usages and customs to the same matters pertaining, which other constables heretofore have duly and reasonably used in their "time."

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dismiss them from the suit. Accordingly, they prayed that they might be dismissed from the suit and that the plaintiffs might be condemned in the costs incurred on the part of the defendants, and condemned also to whatever further might be requisite that right and justice might be done.

Alternatively, in general and of grace, not binding themselves thereby to the burden of superfluous proof and saving to themselves the benefit of the law in all things, the defendants contended that the display by them of the armorial bearings granted to the plaintiffs was not contrary to the laws, usages or customs of arms on the grounds (1) that by the decisions in *Russel's Case* [3] and in *Oldis* v. *Donmille* [4] it was held that private persons were not punishable by or answerable to proceedings in the Court of Chivalry for assuming to and upon themselves to make arms, order funerals without authority, and paint arms contrary to heraldry, and that, mutatis mutandis, the present matter fell within those decisions; and (2) that the display of armorial bearings by a person other than the grantee or a person to whom they had been allowed or otherwise authorized by the King of Arms was not of necessity a denial of such grant or allowance or other authority, and was not of necessity a denial of such rights as the grantee or other person had or was proclaimed to have by virtue of the grant or allowance or other authority, and was not in itself an assertion that the arms were those of the person who displayed them or were his to the exclusion of the grantee or other person. Accordingly, they prayed that they might be dismissed from the suit and that the plaintiffs might be compelled to make full satisfaction and restitution of their honour, and that they might be condemned in the costs of the suit incurred by the defendants, and condemned to whatever further might be requisite according to the laws and customs of arms and of the court by its definitive sentence.

The definitive sentence porrected by the plaintiffs was that the court should pronounce decree and declare that the plaintiffs lawfully bore the arms, crest, motto and supporters in the cause libellate, and that the defendants had displayed representations of them in the manner libellate without the leave or licence and contrary to the will of the plaintiffs and the laws and usages of arms, and that the court should "inhibit and strictly enjoin the "defendants that they do not presume to display the said arms,

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[3] (1692) 4 Mod.Rep. 128.

[4] (1695) Show.P.C. 74.

"crest, supporters and motto or any of them without the leave "and licence of the plaintiffs," and that the defendants should be condemned in costs.

The definitive sentence porrected by the defendants was that the court should "pronounce decree and declare that the defen-"dants ought of right to be dismissed and absolved from the claim "and demand of the plaintiffs touching the matter set forth or "claimed in the said pretended libel," and that they should be dismissed and absolved accordingly, and that the plaintiffs should be condemned in costs.

Costs on each side were agreed at £300.

Squibb, for the plaintiffs, formally exhibited the grant of arms. The statutes of Richard 2 constituted general limitations on the jurisdiction of the court, which had been meddling in matters belonging to the common law, but it is submitted that as regards other matters the court is bound by its own customs and usages and that it is quite clear that the custom and practice of the court was to deal with cases where one person used or had used arms belonging to someone else: see Coke's Institutes, vol. 4, c. 17, p. 125. The cases heard, as appearing from the records of the court, fell into two main groups; those concerning bogus arms, such as *St. George* v. *Tuckfield*,[5] and *Oldys* v. *Tyllie*,[6] and those concerning disputes as to genuine arms, for example, *Scrope* v. *Grosvenor*.[7]

[LORD GODDARD, referring to *Chambers* v. *Jennings*.[8] Is there any more modern authority as to the powers of the court?]

The court can only disappear by Act of Parliament. *Rex* v. *Wells Corporation*[9] is relied on, and see *Rex* v. *Mayor and Jurats of Hastings*[10] cited in the argument.[11]

[LORD GODDARD. It may be that by various decisions the court has been shorn of all its powers so that if the Earl Marshal had not seen fit to set up the court it would have been a good answer to an application for an order of mandamus that there was no point in setting it up.]

If the court did not sit it might be a great injustice because the common law courts have expressly declined all jurisdiction in these matters and this is the only court which has jurisdiction in relation to armorial bearings. Although the matter in dispute here seems small, the principle involved is of importance, and serious inconvenience would result if the court had no jurisdiction.

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[5] (1637) Cur.Mil.Boxes 3/87, 98; 7/55; 9/4/3; 18/1*a*–*b*.

[6] (1687) Cur.Mil.Boxes X/12/1–3; X/23/5.

[7] (1389) Calendar of Close Rolls, Ric. 2, Vol. 3, 586.

[8] (1702) 7 Mod.Rep. 125.

[9] (1836) 4 Dowl. 562.

[10] (1822) 1 D. & R. 148.

[11] 4 Dowl. 562, 563.

[Lord Goddard. Has an armiger a right to allow others to use his arms?]

The only effect of permission would be to bar the armiger from taking proceedings; permission would be no answer to proceedings in which the office of the judge was promoted by one of the Kings of Arms.

The decision of the court can be enforced in three ways; by suing on the bond which the parties have presented in accordance with the practice of the court; by imprisonment by the Earl Marshal; and by a declaration that a party not complying with the sentence is in contempt, and a motion for committal in the High Court. This court is subject to orders of prohibition from the High Court and therefore the Divisional Court has an inherent jurisdiction to protect it: enforcement turns upon that fact: compare *Rex* v. *Editor of the Daily Mail*,[12] in particular the remarks of Avory J.[13]; see also *Rex* v. *Daily Herald*,[14] *per* Lord Hewart C.J.[15] In the present case the plaintiffs only ask that the defendants be enjoined.

Russel's Case [16] and *Oldis* v. *Donmille* [17] do not support the proposition contended for by the defendants; *Russel's Case* [18] is an authority only for saying that the court has no jurisdiction in a matter with which the common law courts had power to deal; it was not concerned with an armorial bearing but with a matter impinging upon the rights of the officers of arms: see the remarks of Holt C.J. in *Chambers* v. *Jennings*.[19] *Russel's Case* [20] was followed in *Oldis* v. *Donmille*,[21] which goes no further to support the defendants' case: see the report in Hist. MSS. Commission, House of Lords MSS., 1695–97 (1903), vol. 2, N.S., pp. 154, 155.

A. Colin Cole for the defendants. A proper interpretation of the statute 13 Richard 2, St. 1, c. 2, excludes the present case from the jurisdiction of the court. The preamble states that the court encroaches on the common law and it sets out that the jurisdiction of the court is "to have cognizance of contracts

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[12] [1921] 2 K.B. 733.

[13] Ibid. 750.

[14] [1932] 2 K.B. 402.

[15] Ibid. 412.

[16] 4 Mod.Rep. 128; 1 Show. 209; sub nom. *Russel* v. *Oldish*.

[17] Show.P.C. 74.

[18] 4 Mod.Rep. 128.

[19] 7 Mod.Rep. 125, 127.

[20] 4 Mod.Rep. 128.

[21] Show.P.C. 74.

"touching deeds of arms and of war out of the realm." The expression "deeds of arms" is a translation of "faits darmes" which clearly means "feats of arms"; that has nothing to do with armorial bearings but only with deeds of arms, performed at jousts or tournaments: see Oxford English Dictionary, heading "Deed," p. 116, 1,b. Although that first limb does not apply in this case, because the matter is within the realm, the second limb, "and also of things that touch war within the realm" (which, according to the French text,[22] should read things that touch "arms or war") must be construed ejusdem generis with the first limb with regard to the jurisdiction there defined.

[LORD GODDARD. A grant of arms is made by the Kings of Arms who derive authority from the Earl Marshal; cannot the Earl Marshal protect armorial bearings in any way?]

This is the one type of case in which the Earl Marshal cannot protect armorial bearings because it does not fall within his jurisdiction. Reliance is placed on the comment in Hawkins' Pleas of the Crown (1824 ed.), Vol. 2, c. 4, pp. 13, 14: "Yet it seems "to be taken for granted in some books that disputes concerning "precedency, and points of honour, and satisfaction therein, are "proper for this court . . . yet it seems to be a large interpretation to make these things relate to war, so as to come within "the declaration above mentioned." It would be a large interpretation if the present matter was brought within the powers of the court as defined by the statute. See also the observations of Holt C.J. in *Chambers* v. *Jennings*.[23]

[LORD GODDARD referred to Comyns' Digest (1764), tit. Courts, E. 2, quoted by Lord Blackburn in *Sturla* v. *Freccia*[24] and to *Ashford* v. *Thornton*.[25]]

A study of the cases leads to the conclusion that this case should not be governed by previous cases because those after 1521 are bad precedents.

[LORD GODDARD. The statutes limit the power of the Constable. They do not deal with the jurisdiction of the court, but merely say that the court must not encroach upon the common law courts.]

Although between 1385 and 1410 the court did exercise jurisdiction in armorial causes it is clear that they were all such as to fall within one or other of the two limbs of the statute. The evidence of John of Gaunt in *Scrope* v. *Grosvenor*[26] is relied upon as showing that the dispute came to a head on a military expedition into Scotland in 1385. *Lovel* v. *Morley*,[27] heard at Newcastle, was also concerned with matters that arose on a military expedition into Scotland.

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[22] "al conestable apartient davoir "connissance des contractz tochantz "fait darmes & de guerre hors du "roialme & auxint des choses qe "touchent armes ou guerre deinz le "roialme. . . ."

[23] 7 Mod.Rep. 125, 128.

[24] (1880) 5 App.Cas. 623, 628.

[25] (1818) 1 B. & Ald. 405.

[Lord Goddard. I do not see how I can hold that the court has no jurisdiction in this matter. The court has consistently throughout its history dealt with this particular subject of dispute, and writers of eminence such as Comyns, Coke and Blackstone have recognized its jurisdiction.]

The text books are by latterday commentators; in 1954 this court is entitled to take a fresh view and to go back to the source in order to ascertain its jurisdiction. Regard should be had to all the precedents. It is submitted that the jurisdiction of the court in relation to armorial bearings, on the authority of the earliest cases, only concerns disputes which arose on military expeditions either outside or within the realm, or at a tournament within the realm. The conclusion from the cases occurring after 1521, after the Constable had ceased to function, is that the court in the person of the Earl Marshal purported to act in cases in which, had the Earl Marshal and the Constable sat together, they would not have acted. Nearly all the cases are causes of office; the only two causes of instance are *Pauncefote* v. *Pauncefote*,[28] and *Perrot* v. *Perrocke alias Perrot*,[29] which are distinguishable from this case, and in which it is submitted that the court exceeded its jurisdiction.

[Lord Goddard referred to *Stepkin* v. *Dobbins*.[30]]

The law of arms as defined in the proceedings in this court in the seventeenth century is not referable to disputes such as this between corporate bodies: *Oldys* v. *Tyllie*[31]; *Oldys* v. *Booth*.[32] The "usages and customs" referred to by Blackstone as supporting the claim of the court can only refer to matters concerning natural persons; the earliest record of a grant of a coat of arms to a corporation was in 1438, but there is no record of any cause in this court where both the parties were corporations and the arms of a corporation were the subject of the dispute.

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[26] Nicolas, Scrope and Grosvenor Roll: being the proceedings in the cause between Richard Lord Scrope of Bolton and Sir Robert Grosvenor as to their right to arms, 1385–90 (1830), vol. 1, pp. 49–50.

[27] (1386–91) College of Arms MS., Processus in Curia Marescalli, vol. ii, pp. 21, 33.

[28] (1638) Cur.Mil.Boxes 18/3*a*.

[29] (1639) Cur.Mil.Boxes 2/85, 86; 5/29, 30; Acta Cur.Mil. (5), 69–76, 78, 80, 87; Cur.Mil. 1631–1642, 228–9.

[30] (Approx. 1638) Cur.Mil. 11. 150–169; Cur.Mil.Boxes 7/24; 13/2*y*.

[31] (1687) Cur.Mil.Boxes X/12/1–3; X/23/5.

[32] (1693) Cur.Mil.Boxes X.1*g*; X/23/35; Misc.Cur.Mil. 258–60.

[Lord Goddard. If it is one of the functions of the court to protect arms, what distinction can be drawn between those of a corporation and those of a natural person?]

One would like to say none, but it is a remarkable fact that the arms of corporations, who are the greatest sufferers from infringement, have never in fact been protected.

[Reference was also made to *Grey* v. *Hastings*,[33] *Duck* v. *Mosely*,[34] *Oldys* v. *Tyllie*[35] and *Oldys* v. *Booth*.[36]]

[Lord Goddard. Is a coat of arms a property or a dignity?]

If it is a property it does not come within property as the common law knows it; it is more in the nature of a dignity. In *In re Sir John Rivett-Carnac's Will*[37] Chitty J. held that a dignity was an incorporeal hereditament within the meaning of the Settled Land Act, 1882, but it is not right to say that an armorial bearing is an incorporeal hereditament for all purposes.

Private persons are not punishable in this court for making arms contrary to heraldry; the complaint in this case relates to a display of arms as part of a scheme of decoration; a wrongful "bearing" of arms is not alleged, as it was in *Grey* v. *Hastings*.[38] On the authority of *Russel's Case*[39] the Divisional Court would order prohibition in respect of this cause, for there was not a wrongful "bearing or using" of arms. This is a term of art, and has been since at least 1400, and means more than mere display.

A display of the arms of another for ornamental purposes does not affect the right of the armiger because it is not necessarily an assertion of right to the arms; there are numerous examples of decorative or commemorative use; and the circumstances must be looked at to see whether it is such a display as only a person entitled to arms can make, that is, whether it amounts to a "bearing and using," an assertion of right by a person which, if he were not entitled to arms by grant or otherwise, would be a wrongful bearing and using. Wide powers were given to the visiting officers of arms by the Commissions of Visitation (see the Commission of Visitation in 1680, put in evidence in the *Shrewsbury Peerage Case* [40] (Minutes of Evidence, printed in 1854, pp. 663, 664) and the Commission of 1530 (described in Heralds and Heraldry in the Middle Ages (1939), A. R. Wagner) yet those powers were not used to prevent a display of arms for decorative purposes: for example, no objection was taken by the visiting officer of arms to stained glass windows filled with shields not belonging to the householder but put up as decoration in Sarsdone House in Oxfordshire: see the Wood MS.,[41] described in The Visitations of the County of Oxford (Harleian Society Publications, Vol. 5 (1871)), Turner, p. 9).

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[33] (Hen. 4.) An account of the controversy between Reginald Lord Grey of Ruthyn and Sir Edward Hastings in the Court of Chivalry in the reign of King Henry IV (1841), C. J. Young.

[34] (1638) Cur.Mil.Boxes 18/2*a*–*c*.

[35] (1687) Cur.Mil.Boxes X/12/1–3; X/23/5.

[36] (1693) Cur.Mil.Boxes X 1g; X/23/35; Misc.Cur.Mil. 258–60.

[37] (1885) 30 Ch.D. 136; 1 T.L.R. 582.

[38] Supra.

[39] 4 Mod.Rep. 128.

It has never been held that it is improper according to the law of arms to use the arms of another on a seal [Some Feudal Lords and their Seals, ed. Foster, De Walden Library, 1904, referred to]; the less is it improper here, where the defendants are not using the seal of another, for their name is on it, although there is a representation of the plaintiffs' arms on it as a decoration. In the fourteenth century, Thomas Percy, Bishop of Norwich, used a seal showing his own arms and also those of Henry, Duke of Lancaster, and the arms of FitzAlan and Clifford: see the Catalogue of British Heraldic Art, Burlington Fine Arts Club (1916), p. 86, Seal No. 20 (Seal of Thomas Percy, Bishop of Norwich 1355–69, attached deed dated August 17, 1367), and seal No. 38, put to a confirmation in 1397 by John Assheman, which has not his arms, but those of a stranger to the grant (p. 91).

Squibb, in reply, referred to *Wyght* v. *Tannere* [42] and the *Shrewsbury Peerage Case*, Minutes of Evidence. A coat of arms is not any form of property known to the common law; a grant is not limited to the grantee and his heirs male as in a common law grant but to the grantee "and his descendants." There is no reason why this court should not be open to bodies corporate; there were grants of arms to corporations in the Middle Ages. As to the suggestion that the Bishop of Norwich used the arms of the Duke of Lancaster on his seal, it was probably because the Duke of Lancaster was his patron, and the plaintiffs object that it should be suggested that they are the patrons of the defendants in this case.

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[40] (1857) 7 H.L.C. 1.

[41] (1574) Bodleian Lib. D.14; [a photostat produced but not put in, counsel for plaintiffs accepting the edited version of the MS. in Harl. Soc., vol. 5, 1871].

[42] (1394) Calendar of Patent Rolls, Ric. 2 (1391–1396), p. 380.

LORD GODDARD. As surrogate to the Earl Marshal I declare that the court has jurisdiction in this matter. I give judgment for the plaintiffs for the agreed amount of costs. The reasons for the judgment will be put into writing. I shall deliver them at an early date and by permission of the Earl Marshal I shall do so in his absence.

1955. Jan. 21. LORD GODDARD, SURROGATE. On March 1, 1842, the Kings of Arms of Her late Majesty Queen Victoria granted a coat of arms and crest to the recently incorporated borough of Manchester, since enhanced to the dignity of a city, and supporters were granted by Garter's warrant on the following day. The corporation now allege and complain that the defendants, the Manchester Palace of Varieties Ld., have over a period of years usurped the achievement granted to them by displaying the arms above the auditorium of the theatre and by using them as their common seal. The defendants admit the allegations of fact in the libel but deny the jurisdiction of this court, first, because they say that the court can only deal with matters set forth in the statutes 8 Ric. 2, c. 5, and 13 Ric. 2, st. 1, c. 2, and that the matters alleged do not bring this case within those statutes. Secondly, they submit that judgments binding on this court have decided that private persons are not answerable to or punishable by this court in respect of such matters as are alleged in the complaint.

It is not contended that this court, however long a period may have elapsed since it last sat, is no longer known to the law. It was originally the Court of the Constable and Marshal and has probably existed since the Conquest. At least it had been in existence for very many years before the reign of Richard II, who reigned from 1377 to 1399, and during his time the famous case of *Scrope* v. *Grosvenor*[1] was heard before it. The hereditary office of Lord High Constable was abolished on the attainder of the Duke of Buckingham in 1521, since when the court has always been held before the Earl Marshal or his surrogate alone, and his right to hold the court and to adjudicate at least on heraldic matters was recognized and confirmed by Letters Patent of James I in 1622, and those of Charles II in 1672, which were read at the opening of this court. Its records show that frequent sittings have taken place and judgments have been given by the Earl Marshal alone acting through his surrogate. In origin, no doubt, the court was essentially a military tribunal, the forerunner of courts-martial, which were in later years established under Articles of War issued by the Sovereign from time to time, and now are established and regulated by the Army Act. As the origin of armorial bearings was, or at least is commonly believed to have been, a method of identifying knights clothed in armour, it was natural that disputes with regard to the right to display a particular achievement on a shield should have fallen within the cognizance of this court. The power to grant armorial bearings is, as I understand it, delegated by the Sovereign to the Kings of Arms who, with their officers, were incorporated as a College of Arms in the reign of Philip and Mary. The Earl Marshal is the head and, I think, the visitor of the college. The right to bear arms is, in my opinion, to be regarded as a dignity and not as property within the true sense of that term. It is conferred by a direct grant or by descent from an ancestor to whom the arms had been originally granted. There is authority that a dignity which descends to heirs general or to heirs of the body is an incorporeal hereditament whether or not the dignity concerns lands: see *In re Sir J. Rivett-Carnac's Will*,[2] which related to a baronetcy. It was not contended before me that armorial bearings were an incorporeal hereditament, and in any case it is clear that the right to bear arms is not a matter cognizable by the common law, which seems to show that there is no property in arms in the legal sense, otherwise the courts of law would protect them.

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[1] (1389) Calendar of Close Rolls, Ric. II, Vol. 3, 586.

Mr. Cole, in the course of a careful and learned argument, submitted that the powers of the court were defined by the statutes of Richard II referred to above, now repealed by the Statute Law Revision Act, 1881. He argued that the effect of those statutes was that the court had power to act in relation to armorial bearings only when carried to war outside the realm or displayed at a tournament within the realm and possibly if carried in an army engaged in suppressing rebellion, that is to say, in a civil war. In my opinion, however, the statutes of Richard II were intended, or at least have been so regarded, to confine this court to matters of dignity and arms, and to prevent it from entertaining matters cognizable by the ordinary courts of the kingdom. The common law courts have always been vigilant and jealous of any attempt to usurp or encroach on their jurisdiction. Many instances are to be found in the books of prohibitions to the Court of Admiralty and to the spiritual courts, and the liability of the latter to writs of prohibition, though not of certiorari, was fully discussed in the recent case of *Rex* v. *Chancellor of St. Edmundsbury and Ipswich Diocese*.[3] But that this court has jurisdiction in matters relating to armorial bearings has been recognized by the highest authorities. Coke C.J. deals with the Court of Chivalry at length in the Institutes, vol. 4, chap. 17 [123]. In Comyns' Digest (1764), tit. Courts, E. 2, 485, it is said: "so the Court" [of Chivalry] "has an absolute jurisdiction, by prescription, in matters of honour, pedigree, descent and coat armour," and this passage was quoted by Lord Blackburn without comment in *Sturla* v. *Freccia*.[4] Blackstone [Commentaries, Book III, c. 5 [68]] deals with the court as an existing court though one which has, he says, by reason of its narrow and restricted jurisdiction, fallen into contempt and disuse. He points out that the statute of 13 Ric. 2 gives it cognizance touching deeds of arms together with other usages and customs to the same matters appertaining, and he said [ibid. Book III, c. 7 [103]] that the words "other usages and customs" support the claim of the court to give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour, whence it follows that its civil jurisdiction is principally in two points: that of redressing injuries of honour and correcting encroachments in matters of coat armour, precedency, and other distinctions of families.

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[2] (1885) 30 Ch.D. 136; 1 T.L.R. 582.

In Hawkins' Pleas of the Crown, vol. 2, a chapter is devoted to the court, and that very learned author has no doubt, not only that the court existed, but that the absence of the constable made no difference to its jurisdiction in these matters that I have mentioned. He says, at p. 15: "Neither is it probable, that the lord-marshal, upon the extinguishment of the hereditary office of the constable, should from time to time . . . hold this court by himself, without any constable, and also often be assisted therein by the judges of the common law, unless it were then well known that such his proceeding was warranted by the ancient and established usage of his court; and it is very extraordinary, that our judges and lawyers should generally take it as a thing granted, that the marshal is at this day the proper judge of points of honour, etc., if it were imagined that

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[3] [1947] K.B. 263; 62 T.L.R. 706; [1946] 2 All E.R. 604; [1948] 1 K.B. 195; 63 T.L.R. 523; [1947] 2 All E.R. 170.

[4] (1880) 5 App.Cas. 623, 628.

"he has no power to act without the concurrence of a constable." Hawkins' opinion is of particular value, as he was in practice as a serjeant at the time when this court last sat, that is, in 1737. *Chambers* v. *Jennings*[5] has been cited as authority for the proposition that the court cannot sit in the absence of the Constable, but what the court decided in that case was that the court could not entertain any longer an action for words. Slander was cognizable by the courts of common law. They were not going to have the Court of Chivalry abrogating to itself that which could be tried in the Court of Common Pleas, and they took what may perhaps be described as a short cut by saying that whatever colour there be to hold the plea of some things before the Marshal alone, there was no pretence to hold a plea of words before the court in the absence of the Constable. The explanation of *Russel's Case*[6] and *Oldis* v. *Donmille*,[7] in my opinion, is that the matters there complained of were an infringement of the privileges of the heralds which might result in their temporal, that is, financial loss. Therefore, there was a remedy by an action on the case and accordingly this court was prohibited.

The passage from Hawkins which I have cited in effect amounts to this, that communis opinio among lawyers is evidence of what the law is, which is the way Lord Ellenborough put it in *Isherwood* v. *Oldknow*,[8] and in view of the opinions which I have cited of authors whose works are recognized as of the highest authority, I have no hesitation in holding that this court has jurisdiction to deal with complaints relating to the usurpation of armorial bearings. Blackstone, it is true, regarded the court as obsolete when he was writing not many years after its last recorded sitting, and his view is indorsed by Sir William Holdsworth in vol. 1 of his History of English Law, pp. 578 and 580. No doubt one of the reasons why the court fell into disuse was because how its decisions are to be enforced is a matter of great doubt and obscurity, but once it is established that this court exists, whatever interval may have elapsed since its last sitting, there is no way so far as I know of putting an end to it save by an Act of Parliament. There may be very good reasons for a court no longer exercising powers which were undoubted in days gone by. I may instance the powers of the spiritual courts over the laity. For centuries they exercised a very active jurisdiction over laymen in so-called criminal causes, and all forms of immorality and not merely adultery were within their cognizance, " pro reformatione morum et pro salute animae." Although they have been deprived by statute of this jurisdiction with regard to many matters, for example, slander and brawling in church, still in theory they could make decrees of excommunication against an immoral layman and enjoin penance and, what is more, order costs. If I may refer to a judgment of my own on this point, I dealt with the matter at some length in *Blunt* v. *Park Lane Hotel Ld.*[9] I there endeavoured to show the reason why this jurisdiction had become obsolete and beyond recall without the intervention of a statute. It is because judgments of ecclesiastical lawyers of the highest eminence have said that such jurisdiction is not in accordance with modern thought, and ought no longer to be exercised. In the ecclesiastical courts the office of the judge cannot be promoted in a criminal cause without leave: see *Maidman* v. *Malpas.*[10] In view of the pronouncements on this subject by Lord Penzance and others, it is unthinkable that any Diocesan Chancellor or Dean of the Arches would permit such a suit nowadays to be promoted. I refer to this matter particularly because it seems to me to indicate a method by which any abuse of this court's undoubted jurisdiction can be prevented. The surrogate of this court and the advocates who practised in it were always civilians, and there seems every reason why the practice which obtained in the courts of the civilians should apply here. If, therefore, it is laid down as a rule of this court, as I would very respectfully suggest to the Earl Marshal it should be, that leave must be obtained before any proceedings are instituted, it would, I think, prevent frivolous actions, and if this court is to sit again it should be convened only where there is some really substantial reason for the exercise of its jurisdiction. Moreover, should there be any indication of a considerable desire to institute proceedings now that this court has been revived, I am firmly of opinion that it should be put upon a statutory basis, defining its jurisdiction and the sanctions it can impose.

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[5] (1702) 7 Mod.Rep. 125.
[6] (1692) 4 Mod.Rep. 128.
[7] (1695) Show.P.C. 74.
[8] (1815) 3 M. & S. 382, 396.

To deal, then, with the present complaint, two matters are alleged: the display of the arms in the auditorium of the theatre, and the use of the arms of the city as the common seal of the defendant company. The latter does seem to me to be a legitimate subject of complaint. The corporation of a great city can properly object to their arms being used on any seal but their own. A deed sealed with an armorial device is thereby authenticated as the act and deed of the person entitled to bear the arms. It is indeed the seal which makes a document a deed and enables an action of covenant to be maintained—a form of action far older in English law than assumpsit. For the company to use the arms of the city as its seal looks very much like an attempt to identify the company with the corporation of the city. With regard to the display in the auditorium, if that were the only complaint, I should have felt it raised a matter of some difficulty. I am by no means satisfied that nowadays it would be right for this court to be put in motion merely because some arms, whether of a corporation or of a family, have been displayed by way of decoration or embellishment. Whatever may have been the case 250 years ago, one must, I think, take into account practices and usages which have for so many years prevailed without any interference.

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[9] [1942] 2 K.B. 253, 257; 58 T.L.R. 356; [1942] 2 All E.R. 187.

[10] (1794) 1 Hag.Con. 205.

It is common knowledge that armorial bearings are widely used as a decoration or embellishment without complaint. To take one instance, hundreds if not thousands of inns and licensed premises throughout the land are known as the so-and-so Arms, and the achievements of a nobleman or landowner are displayed as their sign. It may be and frequently is the case that the family whose arms are thus displayed have parted with their lands in the neighbourhood and perhaps have never owned the inn or at least do so no longer. The arms of universities, colleges or dioceses displayed on tobacco jars, ash trays, teapots and other articles of domestic use are to be found in shops all over the country and are dear to the hearts of souvenir hunters, tourists, American and others, as well as seaside visitors. In strictness, I suppose none of these people has any right to use or display articles thus emblazoned. Then again, at the present day, many a gracious ancient house bears over its porch the arms of the family who built but no longer lives in it. It may be that the line is extinct; it may be that necessity has compelled a sale to another who has recently made a fortune as ample as the original builder amassed; perhaps in Cotswold wool, the slave trade, or just as an acquisitive landowner. Could this court be asked to deface the fabric by ordering the removal of the original achievement which has adorned the house it may be for hundreds of years? The vendor could not complain if he sold the house without first removing the device, nor can I conceive of the Attorney-General, in whom is vested such of the powers and duties of the former King's Advocate as may still remain, emulating the activities of Dr. Duck or Dr. Oldys in the seventeenth and early eighteenth centuries and seeking to have the new owner declared to be "no "gentleman and disentitled to bear arms," or at least the arms thus displayed. Let me quote from Bacon's Essay on Judicature: "Let penal laws, if they have been sleepers of long, or if "they be grown unfit for the present time, be by wise judges "confined in the execution."

Where, then, is one to draw the line? It can, I think, only be done by the exercise of common sense and by saying that use or display in such circumstances would not be a ground for intervention by this court. In view, however, of the use by the defendants of the arms of the city as their common seal, and the contentions which they have set up in this case, I think that the court may properly inhibit and enjoin them from any display of the corporation's arms, and accordingly I pronounce the sentence porrected by the plaintiffs, except that, subject to further argument, I should propose to delete the words "without "the leave and licence of the plaintiffs." These words appear to assume that a grantee of arms can himself authorize and permit another to bear them. I am not at present satisfied that this is permissible by the law of arms, as it seems to me that it would infringe the rights of the Officers of Arms, who alone can make grants, and might deprive them of revenue.

Mr. Squibb, I should like to hear what you say about those words being deleted?

Squibb. I would not oppose the deletion; the only reason why those words were put in was to meet a possible defence of leave and licence, which might have the effect of disentitling the plaintiffs to sue. Leave and licence could not confer any right as against the world, but it might well give rise to a plea of condonation.

LORD GODDARD. That was not raised in the case.

A. Colin Cole. There is nothing that I can usefully add.

LORD GODDARD. Very well. I will take those words out. As to costs, I will take out that part of the sentence also.

Sentence accordingly.
Judgment for the plaintiffs.

Solicitors: *Philip B. Dingle, Town Clerk, Manchester; Pritchard, Englefield & Co. for Boote, Edgar & Co., Manchester.*

J. F. L.

DENNIS *v.* DENNIS (SPILLETT CITED).

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Mar. 16, 17.

Singleton, Hodson and Morris L.JJ.

Husband and Wife—Divorce—Adultery—Meaning—Attempted sexual intercourse—Temporary impotence of man cited—No penetration—Adultery not committed.

The wife and the intervener attempted to have sexual intercourse, but owing to a nervous disability from which he suffered he had been unable to accomplish his purpose and there had been neither penetration nor emission:—

Held, that although, to establish adultery, it was not necessary that the complete act of sexual intercourse must be proved, some penetration of the female organ by the male organ must be found to have taken place. On the facts of the present case the court was satisfied that no penetration could have or had occurred and, therefore, the wife was not guilty of adultery.

Dictum of Lord Birkenhead L.C. in *Rutherford* v. *Richardson* [1923] A.C. 1, 11; 39 T.L.R. 42 explained. Karminski J.'s explanation thereof in *Sapsford* v. *Sapsford and Furtado* [1954] P. 394, 399; [1954] 2 All E.R. 373 approved.

Judgment of Commissioner Edgedale Q.C. affirmed.

APPEAL from Mr. Commissioner Edgedale Q.C.

The wife, Mrs. Edith Betty Dennis, petitioned for divorce on the grounds of cruelty and desertion by her husband. The husband, Samuel Dennis, by his answer, alleged adultery by the wife with an intervener, one Spillett, and also desertion by the wife. The wife filed a discretion statement in respect of the alleged adultery, but subsequently withdrew it. The case came before Mr. Commissioner Edgedale Q.C. in October, 1954, when the wife in her evidence stated that, she and Spillett having become on friendly terms, he visited her at her flat on several occasions in 1941, and on the last occasion they had agreed to

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have sexual intercourse; that all necessary steps to carry out that intention were taken; but that, owing to a nervous disability from which he suffered, Spillett was unable to carry out his purpose and there was in fact no penetration and no emission. Spillett gave evidence in corroboration of the wife's statement. The commissioner, who accepted the evidence of the wife and of Spillett, found that the wife had not committed adultery and he granted her a decree on the ground of cruelty by the husband.

The husband appealed.

The case is reported only on the question of what constitutes adultery.

J. Lloyd Eley and *W. Denny* for the husband. The commissioner came to a wrong conclusion. In Raydon on Divorce, 6th ed., at p. 111, adultery is defined thus: "For purposes of "relief in the Divorce Division, adultery may be defined as con- "sensual intercourse between a married person and a person of "the opposite sex during the subsistence of the marriage. . . . "It is the inception of the adultery and not its repetition that is "the material event; it may be an isolated act. Once sexual "intercourse is proved, the onus of proof is on the respondent to "show it was not consensual." Note (c): "What degree of "sexual intimacy amounts to an act of intercourse for which "relief may be claimed has never been clearly defined by the "court. Although indecent behaviour, short of sexual inter- "course, is not adultery, an inference of adultery would almost "inevitably be drawn by the court from evidence of grossly "indecent behaviour; unless in those exceptional cases where the "respondent is in a position to prove that sexual intercourse "could not have occurred, e.g., where a husband is charged with "adultery with a woman proved to be virgo intacta: see "*Rutherford* v. *Richardson*.[1] . . . Expert evidence as to virginity "however, is not always conclusive . . . and it has been the rule "that relations falling short of complete penetration may consti- "tute adultery: *Thompson* (*orse. Hulton*) v. *Thompson*."[2]

The courts will infer adultery without proof of penetration. They have in fact gone further and held that less than penetration is sufficient if there has been sexual gratification: see *Jolly* v. *Jolly and Fryer*[3]; *Thompson* (*orse. Hulton*) v. *Thompson*[4]; and the dictum of Lord Birkenhead L.C. in *Rutherford* v. *Richardson*.[5] The test of what is adultery is the possibility of insemination and consequently of spurious issue. For the purpose of the present case it is submitted that adultery includes an attempt at penetration, involving the wife's surrender of her organs of generation. An attempt at penetration is adultery.

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[1] [1923] A.C. 1.

[2] [1938] P. 162; [1938] 2 All E.R. 727.

[3] (1919) 63 S.J. 777.

[4] [1938] P. 162, 169.

S. Seuffert and *M. Gregory* for the wife. In *England* v. *England*[6] it was held that evidence which is abundantly sufficient to establish adultery does not raise an irresistible presumption, nor estop the parties charged from giving evidence to the contrary nor lead in law to the conclusion that they must be " decreed " to have committed adultery notwithstanding that evidence; that the court was not obliged to decide, in a contested case, that adultery had been committed contrary to its own belief. That applied to the evidence of the wife and Spillett in the present case, which the commissioner accepted. The dictum of Lord Birkenhead in *Rutherford* v. *Richardson*,[7] on which the appellant relies, has been explained by Karminski J. in *Sapsford* v. *Sapsford and Furtado*,[8] and, it is submitted, does not support the appellant's case.

L. O'Malley and *J. H. Aubrey Fletcher* for the person cited. Attempted adultery is not enough. There must be some penetration to establish adultery. The commissioner accepted the evidence of the wife and of Spillett that the latter was impotent, at all events at the material time.

SINGLETON L.J. We think it right to deal first with the issue of adultery which is raised by the answer of the respondent husband. In paragraph 6 of his answer he pleads: " In or about " the autumn of 1941, the petitioner frequently committed " adultery with one C. E. Spillett, who is believed to be residing " at 86, Clarence Avenue, Malden, Surrey (hereinafter called the " first party cited) at 2, Lammas House, Upper Road, Thames " Ditton, in the County of Surrey, and at divers other places." By his cross-prayer the respondent husband asked that the marriage should be dissolved on the ground of that adultery, as well as on other grounds. The wife and the husband were married on February 19, 1938.

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[5] [1923] A.C. 1, 11.

[6] [1953] P. 16.

[7] [1923] A.C. 1, 11.

[8] [1954] P. at p. 399; [1954] 2 All E.R. 373.

The evidence in support of the husband's charge of adultery against his wife was summarized by the commissioner in his judgment. He said that the husband told him that he had become a little troubled about his wife; she was restless at night early in the year 1941: she did not speak about it, but she was strange, and she said to him on one occasion about that time: "I know Mr. Spillett," and she spoke about her relations with him early in the year 1941, and she acted in a strange manner. The judgment continued: "He asked her what was the matter "and there was no definite answer, but she burst into tears "and this led to a confession. She said, 'I am very fond "'of Mr. Spillett,' or 'I love him very much.' She said she "had been going with him to shelters, and for walks during the "lunch times. She said vaguely what he did when he came to "this flat, and said nothing about love beyond the statement "about being very much in love with him. It is not certain "that he offered her his hand, but he talked about transferring "his insurance policies. She said, 'You have been awfully "'decent and I do not wish to hurt you, but I do love this "'man.' She said she felt rotten about transferring her affec-"tion to another man. 'I [the husband] asked her if he was "'married; she said he was and he had a family. I asked where "'he lived and she told me she was not quite sure where it was.' "He [the husband] said he did not ask her outright how far "matters had matured, but he did ask her if she had made love "to him and there was no emphatic Yes or No except that she "liked the man." The husband in his evidence said that at that time his wife would not have sexual intercourse with him. Thus the case of the husband, in so far as adultery is concerned, rested on the confession made to him by his wife, and the commissioner said that the husband told him that infidelity was implied in the statement she made. She did not say: "I have committed "adultery," or "I have committed misconduct with Mr. "Spillett," but she said that she loved him, and from that, according to her husband, an implication that adultery had been committed arose.

The wife in her evidence had said that she had made a confession to her husband, but she had not said that she had committed adultery.

Husband and wife lived together until February, 1953, and though the adultery alleged, if it took place, was condoned, it is said that it was revived by other matrimonial offences, which it is unnecessary to investigate. The question is: Was adultery on the part of the wife proved? No doubt the wife thought at one time that what had taken place between her and Spillett amounted to adultery, for she asked for the discretion of the court and put in a discretion statement in which she described how she met Spillett; they became friendly, and on one occasion committed adultery together at her flat. She said in the discretion statement that she was very ashamed of what she had done; she had confessed to her husband, who promised to forgive her on condition that she never saw the man again. The husband's evidence shows that after the confession she made to him they were reconciled and they lived happily together for some years.

Although the wife appears to have been of the opinion that she had committed adultery a different position arose when her evidence was given. She said that she was attracted by Spillett and that she was ready and willing to commit adultery with him; but that on the only occasion that they attempted it he was unable to do that which was his intention. She described her fondness for Spillett, and she said that he had visited her flat several times, and on the important day she went to the bedroom, took off most of her clothing, and Spillett after a little time followed her to the bedroom, and he took off part of his clothing, and having put upon his person a sheath he got on to the bed on which she was lying. He tried to have sexual intercourse with her, but he was unable to effect his purpose.

Spillett, in evidence, was asked: "Now, did you commit "adultery with her? (A.) I did not. . . . (Q.) I want you to tell "my Lord the details of what took place. (A.) Well—I am a "nervous, rather self-conscious sort of person. Before I had "finished removing my clothes I was highly excited and agitated, "and found myself entirely incapable of any sexual act. (Q.) At "that stage, what was the state—we must go into detail—of "your penis: was it erect or not? (A.) Oh, good gracious, no, no. "(Q.) And did you get on to the bed? (A.) Yes, I got on to the "bed. (Q.) Did you at any time become erect again? (A.) No. "(Q.) Or at all? (A.) No, I had recognized symptoms I knew "about—. (Q.) I will come to that later on: just finish this "episode; and were you able in any way to penetrate her? "(A.) No, sir. (Q.) And did you, being unable to penetrate, did "you get off the bed? (A.) Yes. (Q.) I think you told my Lord "that you recognized the symptoms: would you explain to my "Lord? (A.) Well, that sort of thing, my Lord—that sort of "thing has happened to me before. I dislike mentioning my

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" second married life but it first happened to me on December 12. " (The commissioner): I have to go into all the details of this. " (To the witness): I understand you found yourself unable to " perform the sexual act before, with your wife? (A.) Yes."

The commissioner, speaking of Spillett and of his evidence, said: " On the other hand, I have to confess that when Spillett " was in the witness-box he gave me a complete conviction that " he was telling the truth." He considered, too, the evidence of the wife, and he preferred that to the evidence of her husband. He believed the wife and not the husband on other matters. Finally, he said: " Having regard to what I have already said, it " is clear that I find as a fact that there was no penetration. . . . " In those circumstances I have already indicated and I find that " there was no adultery between Spillett and the petitioner."

Though the wife had asked for the discretion of the court and had put in a discretion statement, upon the whole of the evidence the commissioner was satisfied that there had not been the act of sexual intercourse between her and Spillett, as that expression is normally understood. The husband appeals to this court on this question as well as on other matters which must be dealt with separately, and Mr. Eley, on his behalf, asks us to say that on the evidence of the wife and of Spillett, and upon the findings of the commissioner, adultery was committed, and that the husband ought to be granted a decree upon that ground. His submission was that if a man and a woman behave as the wife and Spillett behaved together in her flat on the day in question, adultery is committed.

It appears to me that there is a danger of confusing adultery with an attempt to commit adultery. It has never been said that an attempt to commit adultery gives the right to one party to a marriage to a decree of dissolution. Mr. Eley placed reliance upon a passage in the speech of Lord Birkenhead L.C. in *Rutherford* v. *Richardson*.[1] That was a case in which the respondent husband was at the time of the petition in a criminal lunatic asylum. The wife alleged adultery with her companion, Miss Richardson, and it was admitted that the husband entered Miss Richardson's bedroom between 10 and 11 o'clock on the night in question, after Miss Richardson was in bed, with the intention of committing adultery with her, and that they had a conversation, but Miss Richardson stated in evidence that she indignantly repelled his overtures and gave him a cousinly scolding; that she told him to go away, which he did; and that he was in her room for a few minutes only. Miss Richardson was in fact virgo intacta. A decree on the ground of adultery had been granted by the judge of first instance. The Court of Appeal set aside that decree, and the House of Lords agreed with the judgment of the Court of Appeal. I have stated some part of the facts to show how far removed they are from the present case.

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[1] [1923] A.C. 1.

The passage on which reliance is placed is where Lord Birkenhead said [2]: "There remains the medical evidence. In the "course of the trial, Miss Richardson, although she had refused "to be examined beforehand, submitted herself for examination "to a medical man employed by her. The Court of Appeal rested "mainly upon that evidence to reach the conclusion that the "decree should be set aside. I assign less importance to it, and "regard it only as affording further corroboration of the other "considerations in favour of the intervener. The evidence of "the doctor was cautious and guarded. It seems, however, to "establish that there had been no penetration and, in the doctor's "opinion, that the appearance of the organs was such as he did "not think consistent with an effective attempt at penetration."

Now come the important words [3]: "Some suggestion was "made in argument in this House that this condition, even "though inconsistent with penetration, was not inconsistent with "some lesser act of sexual gratification. If there were evidence "of such an act, it cannot be doubted that, whatever view may "have been taken in past ages in the Ecclesiastical Courts, a "decree based upon adultery might issue. But it is not open now "to the petitioner to rely on some lesser sexual act. No evidence "was adduced in support of such a suggestion. It was not made "to the intervener or to the doctor, and I do not think that "counsel at the Bar of this House put it forward very seriously."

The submission which is made is that, upon the words of Lord Birkenhead which I have read, a decree of dissolution may be granted for some lesser act of sexual gratification than the act of adultery or sexual intercourse, as those expressions are normally understood. That is why I said that there was a danger of confusing an attempt with the act itself. I recognize that the reference to "some lesser act of sexual gratification" gives rise to a certain amount of difficulty. I believe that the proper view of those words [illegible] be found in a passage in the judgment of Karminski J. in *Sapsford* v. *Sapsford and Furtado*.[4] Having set out the passage from the speech of Lord Birkenhead, which I have just read, the judge said[5]: "If I understand those "words of the Lord Chancellor, he had in mind that particular "case where there had been at any rate an attempt at sexual "intercourse, that is by the introduction of the male organ into "the female, but for one reason or another that attempt had not "fully succeeded." Karminski J. then proceeded to consider the judgment of Langton J. in *Thompson* (*orse. Hulton*) v. *Thompson*.[6]

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[2] [1923] A.C. 1, 11.

[3] Ibid. 11.

I do not think that it can be said that adultery is proved unless there be some penetration. It is not necessary that the complete act of sexual intercourse should take place. If there is penetration by the man of the woman, adultery may be found, but if there is no more than an attempt, I do not think that a finding of adultery would be right.

In some of the recent editions of Rayden on Divorce there has been a definition of adultery. In the current edition, at p. 111, there appears this passage: "For purposes of relief in the Divorce "Division, adultery may be defined as consensual sexual intercourse between a married person and a person of the opposite "sex during the subsistence of the marriage." In an earlier edition the passage was in the same form except that the word "voluntary" has been replaced in the current edition by "consensual." The evidence in the present case shows that both parties were ready and willing to have sexual intercourse the one with the other. Upon the commissioner's findings of fact there was no such sexual intercourse; there was no penetration. In my view there is no distinction to be drawn between the words "sexual intercourse" in the definition of "adultery" which I have read, and "carnal knowledge" in the criminal law. In regard to offences charged under sections 3 and 5 of the Criminal Law Amendment Act, 1885, or upon a charge of rape, it must be shown that there is some penetration. In matrimonial suits it is not often possible to give direct evidence of sexual intercourse; the practice is stated in the first edition of Rayden by the late Mr. William Rayden, which was published in 1910. At p. 63 this passage appears: "It will not be out of place here "to consider the nature of the proofs which will satisfy the court "that adultery has been committed: To succeed on such an

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[4] [1954] P. 394.
[5] Ibid. 399.
[6] [1938] P. 162.

"issue it is not necessary to prove the direct fact, or even a fact "of adultery in time and place; for if it were, in very few cases "would that proof be attainable; it is rarely indeed that parties "are surprised in the direct act of adultery; and such evidence "is apt to be disbelieved; in nearly every case the fact is inferred "from circumstances, which lead to it by a fair inference, as a "necessary conclusion; and, unless this were so held, no protection whatever could be given to marital rights."

If a man and a woman who are attached to each other, as Spillett and the wife were, go to her bedroom and take off the greater part of their clothing and lie upon the bed together, there will arise in most cases a presumption of adultery; in most cases it may be extraordinarily difficult to rebut that presumption. If people do that sort of thing others may think that they do it because they wish to commit adultery together, as indeed they did. The inference of adultery is capable of being rebutted, and upon the findings of the commissioner in this case it was rebutted, for he has found that at the time at which the two were together upon the bed the man was impotent in regard to that woman at least; he was unable to get an erection, and he was, consequently, unable to penetrate the woman to any degree. I am satisfied that, upon that finding of fact, the commissioner took the only course which he was entitled to take. He declined to find that adultery was proved.

For these reasons it appears to me that the appeal on this part of the case must be dismissed. I wish to add that I have sought to confine what I have said to the facts of this case.

HODSON L.J. I agree. On the facts the commissioner found that the wife and Spillett had the intention of committing adultery, and that their behaviour together was grossly indecent, but that no adultery took place for the reason that the man was incapable of the act. He formed the conclusion that there was no penetration of the woman by the man, and in those circumstances that there was no adultery. I agree with that conclusion and the basis on which it stands.

It is obvious that adultery, being a secret matter, as a rule has to be inferred from evidence of inclination and opportunity, and if evidence is given of a guilty intention and of acts of gross indecency, adultery itself may readily be inferred, but it does not follow from that that the acts of gross indecency themselves are acts of adultery. I think that that really is where the argument for the husband leads.

Mr. Eley, on behalf of the husband, has put forward an argument based upon a dictum of Lord Birkenhead L.C. in *Rutherford* v. *Richardson.*[7] That was a case where the woman against whom the charge of adultery was made was apparently a virgin, and Lord Birkenhead said: "The evidence of the doctor was cautious "and guarded. It seems, however, to establish that there had "been no penetration and, in the doctor's opinion, that the "appearance of the organs was such as he did not think was "consistent with an effective attempt at penetration. Some "suggestion was made in argument in this House that this "condition, even though inconsistent with penetration, was not "inconsistent with some lesser act of sexual gratification. If "there were evidence of such an act, it cannot be doubted that, "whatever view may have been taken in past ages in the "Ecclesiastical Courts, a decree based upon adultery might "issue."

The Lord Chancellor went on to say that no evidence had been adduced in support of any suggestion of a lesser sexual act in that case. It is quite clear that the question of anything short of some penetration was never the subject-matter of any evidence in that case, but I think it is fair to Mr. Eley to say that the language of Lord Birkenhead is, on the face of it, wide enough to cover this case, and although it may be limited in the way in which Karminski J. limited it in *Sapsford* v. *Sapsford and Furtado*[8]—that is to say, limited to the consideration of a partial penetration—I think it must be conceded that the actual words of Lord Birkenhead are capable of a wider interpretation and go beyond cases of partial penetration.

It has been long accepted, as Langton J. said in *Thompson* (*orse. Hulton*) v. *Thompson*,[9] that "no one nowadays contends "that the fact that a woman accused of adultery is found to be "virgo intacta is inconsistent with partial intercourse sufficient "to sustain the charge of adultery. The finding of Hill J. in "*Jolly* v. *Jolly and Fryer*[10] is an instance in point, and shows "that this most careful and discriminating judge was ready to "find what he has so properly described as a 'very heavy burden' "discharged, where the circumstances disclosed by the evidence "warranted such a conclusion."

The fact that in cases where the woman is apparently a virgin the argument is put in that way, seems to me to support the view that there must at least be partial penetration for the act of adultery to be proved, for one is considering in these courts of necessity physical matters which must be capable of some sort of precise understanding. A man may commit adultery in his heart, but what the courts are dealing with is the physical act which has to be proved in order that a divorce may be obtained, and I think that all the authorities, including the writers on canon law and ecclesiastical law, when they speak of adultery are speaking of the physical act, understood as carrying with it a conception of natural copulation between the sexes. I think that the word has not been extended to include such a form of what may be described as lesser sexual gratification, as Mr. Eley contends for in this case. The words used by Lord Birkenhead are not precise and have no very precise meaning as to what they are intended to cover.

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[7] [1923] A.C. 1, 11.

[8] [1954] P. 394.

[9] [1938] P. 162, 169.

[10] 63 S.J. 777.

Mr. Eley faced the difficulty by seeking to put forward as a test of what is and what is not adultery the possibility of insemination, and consequently of spurious issue. He said that there must be the possibility of insemination of the female by the male, coupled with some physical contact between the two persons concerned, and that test, he said, is satisfied in this case. Putting it in another way, he said that any attempt at penetration involving the woman's voluntary surrender of her organs of generation to the man would suffice. I am unable to accept that contention. It seems to me to go beyond the limits of what can be regarded as adultery, and for my part I can find no other sure ground upon which to base my decision in this case than that which was adopted by the commissioner and by my Lord, namely, the test of penetration; penetration not necessarily complete, but some penetration in order that the physical fact of adultery may be proved either directly or by inference. I agree, therefore, that the appeal on this part of the case fails.

MORRIS L.J. I also agree. The evidence which may be called in proof of an allegation of adultery may be such that the reasonable and natural inference to be drawn from certain proved circumstances is that penetration took place. The present case, however, is one in which, on its very special and most unusual facts, the conclusion of fact reached was that there was no penetration at all; there was therefore no sexual intercourse, and therefore no adultery. The two persons concerned had the desire to commit adultery and went very far indeed in their attempt to

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effect their purpose, but in fact they did not effect it. I read the words of Lord Birkenhead in *Rutherford* v. *Richardson* [11] as they were understood by Karminski J. in *Sapsford* v. *Sapsford and Furtado.*[12]

Appeal dismissed.

After hearing further argument the court upheld the decision of the commissioner granting the wife a decree on the ground of cruelty.

Solicitors: *Hy. S. L. Polak & Co.; Walmsley & Stansbury; George R. Reid.*

A. W. G.

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[11] [1923] P. 1.

[12] [1954] P. 394.

C. A.

1955
Mar. 24.

Singleton, Hodson and Morris L.JJ.

BRYANT *v.* BRYANT.

[1954 D. No. 757.]

Infant—Custody—Divorce Court—Child born of bigamous marriage—Proceedings for decree of nullity—Power of court to grant order of custody— Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

The mother of two children, whose marriage (before their birth) to the father of the children had been pronounced by the court to be null and void on the ground of the father's bigamy, was refused by the judge an order for the custody of the children on the ground that the court had no power in the circumstances to make such an order. On appeal:—

Held, allowing the appeal, that section 26 (1) of the Matrimonial Causes Act, 1950,[1] expressly conferred on the court in which proceedings for nullity of marriage had been instituted power to make such order as it thought just in respect of the custody, maintenance and education of the children of the marriage.

Galloway v. *Galloway* [1954] P. 312; [1954] 2 All E.R. 143 distinguished.

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[1] Matrimonial Causes Act, 1950, s. 26 (1): "In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court."

APPEAL from Commissioner Judge Fraser Harrison, sitting at Liverpool.

In October, 1941, the petitioner, Mrs. Daphne Madeleine Bryant, went through a form of marriage with the respondent, William Austin Bryant. At that time, unknown to the petitioner, the respondent was married to a woman who was still living. The parties lived together and two children were born of that cohabitation. The petitioner then learned from the respondent that the marriage was bigamous. Proceedings were taken against him for bigamy. He was convicted and served a sentence of imprisonment. In September, 1948, he obtained a divorce from his lawful wife and the petitioner and he went through a second form of marriage which was lawful. After that the petitioner gave birth to her third child. Subsequently, when the respondent deserted her and committed adultery, the petitioner brought proceedings in which she sought a decree of nullity in respect of the first form of marriage and a decree of divorce in respect of the lawful marriage. Both decrees were granted. She also sought orders for custody of the three children of whom the respondent was the father. She was granted an order for custody of the youngest child, but in respect of the two children born of the bigamous union the commissioner held that the court had no jurisdiction to make an order since the children were illegitimate and were not legitimated by the subsequent valid marriage of the parents. He therefore refused to make an order for custody of those two children.

The petitioner appealed.

E. Somerset Jones, for the petitioner, submitted that proceedings for nullity came within section 26 (1) of the Matrimonial Causes Act, 1950, and that the court had power to make provision for custody of the children. As the respondent was not represented in the court below he (counsel) had thought it his duty to call the attention of the commissioner to *Galloway* v. *Galloway*,[2] but there the proceedings were divorce proceedings. There had been no bigamous marriage and the point here in question had not arisen.

[HODSON L.J. *Galloway* v. *Galloway* [2] was not a decision on nullity. . . .]

No. In nullity proceedings parenthood is the test for the jurisdiction of the court to make an order for custody, whereas in divorce proceedings the test to be applied is that of legitimacy.

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[2] [1954] P. 312; [1954] 2 All E.R. 143.

The respondent did not appear and was not represented.

SINGLETON L.J. This is an appeal on a question of custody. It arises under section 26 (1) of the Matrimonial Causes Act, 1950, and that section appears in much the same form in earlier legislation. [His Lordship read the subsection and continued:] The section has given rise to discussion in the courts, as is shown by reference to the case cited to us, *Galloway* v. *Galloway*.[1]

How does it work out in the present case? On October 13, 1941, the petitioner went through a form of marriage with the respondent, William Austin Bryant. It was discovered later that Bryant had been married a couple of years earlier, and he had a wife, Joan, living, so that the form of marriage through which he had gone with the petitioner was null and void; it was a bigamous marriage. In due course the facts came to light and Bryant was prosecuted, and sentenced to 12 months' imprisonment for bigamy. A decree of dissolution of marriage was granted in regard to his first marriage in 1948. I assume that the petitioner was attached to Bryant, for on September 9, 1948, she went through a form of marriage with him. There were born of her bigamous marriage two children, one in 1942 and the other in 1947, and there was born of the lawful marriage one girl in 1950.

Something went wrong in regard to the lawful marriage between the petitioner and the respondent, and in the petition, which is dated October 14, 1954, she sought a decree that the bigamous marriage was null and void as the other party to that marriage had a wife living at the time the ceremony was performed, and she also sought a decree of dissolution of marriage of the 1948 marriage, on the ground of the adultery of Bryant. She succeeded on both those applications. She then asked through counsel for an order under section 26 of the Matrimonial Causes Act, 1950, for custody of the two children of the bigamous marriage, and of the one child of the lawful marriage. I say no more about the later marriage. All we are concerned with is the custody of the two children of the bigamous marriage.

It has been said more than once that the reason for the wording of section 26 is to enable an order to be made in the case of children born of a marriage which turns out, for one reason or another, to be null and void, and that that is the reason for the use of the words "the marriage of whose parents is the "subject of proceedings" instead of the words "husband and "wife"; and so it is said in the present case that the two children born of the bigamous marriage were within section 26, and the court is entitled to make provision with respect to custody, maintenance and education of those two children the marriage of whose parents is the subject of the proceedings; that is, of the nullity proceedings.

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[1] [1954] P. 312; [1954] 2 All E.R. 143.

The commissioner did not make an order in respect of the two children of the bigamous marriage; he was doubtful whether he had power to do so. I am satisfied that he had the power, as the matter was within the strict wording of section 26 (1) of the Act, and that an order for custody ought to have been made. There will therefore be an order in favour of the wife for the custody of those two children, and I suppose the proper course to take is to refer any question of maintenance to chambers.

HODSON L.J. I agree. I think that the matter is perfectly clear, and I only add this. It appears that some difficulty entered into the commissioner's mind because of the headnote in *Galloway* v. *Galloway*,[2] which reads as follows: ". . . the jurisdiction of "the court under section 26 (1) of the Matrimonial Causes Act, "1950, did not extend to an illegitimate child born of parents "in circumstances precluding its legitimation per subsequens "matrimonium under the Legitimacy Act, 1926. . . ." That language does not cover the whole field, and does not cover the children with whom we are concerned in the present case, namely, children of a void ceremony of marriage who are expressly covered by the language of the section, to which reference has been made in this case, in *Galloway* v. *Galloway*[2] and earlier in *Langworthy* v. *Langworthy*.[3] I have nothing further to add.

MORRIS L.J. I agree. It seems to me that section 26 (1) refers to the children of the marriage union even where the marriage is declared to be null and void.

Appeal allowed.

Solicitors: *Chamberlain & Co., for Williams, Elsby & Bren, Liverpool.*

A. W. G.

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[2] [1954] P. 312.

[3] (1886) 11 P.D. 85; 2 T.L.R. 373.

1954
Oct. 15.

Lord Merriman P. and Karminski J.

COOPER *v.* COOPER (No. 2).

Husband and Wife—Justices—Desertion—Dismissal of previous charge of cruelty on similar facts—Estoppel. Divorce—Estoppel. Estoppel—Per rem judicatam.

If in the course of a hearing upon a charge of cruelty matters emerge or have even been particularized which suggest that the spouse accused wishes the other to leave, or tells her to leave, the dismissal of that charge of cruelty does not operate as an estoppel from using such evidence in support of a charge of constructive desertion.

Foster v. *Foster* [1954] P. 67; [1953] 2 All E.R. 518 applied. Observations of Willmer J. in *Bright* v. *Bright* [1954] P. 270, 287; [1953] 2 All E.R. 939 disapproved.

A wife complained in a court of summary jurisdiction that her husband had been guilty of persistent cruelty, and, in addition to giving evidence of alleged assaults, she said that her husband had frequently told her to "pack her bags and clear out." She produced two notes written by her husband, in one of which he told her to "get out," and in the other of which to "clear out." The charge of persistent cruelty was dismissed, and the wife shortly afterwards made a complaint of desertion and wilful neglect to maintain. Her solicitor in answer to a request for information as to the grounds on which she relied said that she did not wholly rely upon the evidence given at the previous hearing. Apart from the notes "Clear out" and "Get out" the husband had (it was alleged) driven her from home by expulsive words and conduct.

Objection was taken at the beginning of the hearing that the wife was attempting to re-open the previous trial, under the guise of alleging desertion instead of cruelty. The objection was upheld and the summons dismissed without evidence other than the production of one of notes being called:—

Held, that there was no estoppel from giving the evidence which the wife sought to tender, and that the case should be remitted for a re-hearing.

APPEALS by wife from two decisions of the Edmonton justices, who dismissed on April 23, 1954, her summons alleging persistent cruelty, and on May 28, 1954, a further summons issued on May 11, 1954, alleging desertion and wilful neglect to provide reasonable maintenance.

The wife left the matrimonial home on April 2, 1954. She gave evidence at the hearing of the summons by which persistent cruelty was alleged of punches and blows, and of quarrels during which the husband was said to have used opprobrious language. She also put in two documents in the husband's handwriting, one of which told her to " clear out " and the other to " get out." She admitted that they had been written because she demanded that what she alleged to be his frequent words to that effect should be put into writing. The first of those documents had been kept for some time, but it had not been acted upon. The second was dated March 27, 1954, but the wife did not leave the matrimonial home until April 2, 1954. In her evidence, having put in the second note, she said: " I said I would go in my time, not his. " He said I can," and then she added: " He kept on saying " ' pack your bags and get out.' I thought it was not any good " going on like this, so I left. We were happy together up to " the time I left, but last had sexual intercourse several years " ago." She said, in re-examination: " As the result of his " accusations of my associations with other men, and continually " telling me to get out, my health has suffered, and I am under " the doctor now."

At the end of her evidence, which concluded her case, counsel for the husband submitted that there was no case to answer. The wife's solicitor was recorded as replying on the law. The submission was accepted, and the summons was dismissed. At the hearing before the Divisional Court it was agreed that what had in fact been submitted was that the wife's evidence ought not to be accepted. The justices in their reasons stated: " This was a complaint heard before the justices on the ground " of persistent cruelty, and the summons, after hearing only the " wife on oath, was dismissed. The justices were of the opinion " that cruelty had not been made out, and that the various acts " of disagreement between the parties had, in many instances, " been contributed to by the complainant's attitude. No physical " assaults of a serious nature were proved, and in any verbal " disagreement the wife proved to be the equal of the husband, " as elicited in cross-examination. Having carefully considered " all the aspects of the wife's evidence, the justices did not feel " the husband had to repudiate on oath the complaint laid against " him, and accordingly the summons was dismissed."

After the dismissal of the cruelty summons, the wife took out, on May 11, 1954, her summons on the ground of desertion and neglect to maintain. She was asked through her solicitor before the hearing to state on what she relied as grounds for the allegation of desertion, and her solicitor replied: " My client does not wholly " rely upon the evidence given at the last hearing. Apart from the " notes ' clear out ' and ' get out " signed by your client, your "client drove Mrs. Cooper from the matrimonial home by expulsive words and conduct." At the hearing on May 28, 1954, the objection was at once made that the wife was attempting to re-open the earlier trial, under the guise of calling her case desertion instead of persistent cruelty. After some argument, it was decided to wait until some particular piece of evidence was formally tendered. Counsel for the wife then put in the note of March 27, 1954. Objection was made, and after argument on case law the objection was upheld and the summons dismissed. The justices in their reasons said: "Upon the wife tendering "such evidence in her examination-in-chief the husband objected "and we upheld the objection. In view of our ruling the wife "was not in a position to give any evidence which could be "accepted as admissible to support her contention, and we "therefore dismissed the summons."

R. W. Vick for the wife.
G. J. Shindler for the husband.

LORD MERRIMAN P. referred to the nature of the appeals and gave leave to appeal out of time against the dismissal of the charge of persistent cruelty, saying that it was desirable, in order to deal with the justice of the matter, that the whole story should be before the court, including the circumstances in which the persistent cruelty summons had been dismissed. He referred to the nature of the wife's evidence at the hearing of the cruelty summons, and in regard to her evidence in re-examination, as quoted above, said that that particular aspect of her evidence had been directed to the evidence on the charge of cruelty relating not to her physical health, for that was covered by the evidence of blows, but to her allegation that she was liable to suffer in her mental health. His Lordship, after referring to the submission made on behalf of the husband at the hearing of the first summons, said that the wife's case of persistent cruelty had been dismissed on the merits because the justices had thought it to be "rubbish." The reasons given were quite sufficient to dispose of the appeal on the question of persistent cruelty, and the first appeal should accordingly be dismissed. His Lordship continued:

The real difficulty is what happened later. Having left on April 2, 1954, the wife took out a summons on May 11, 1954, for desertion and wilful neglect to maintain. Very sensibly, the wife was asked through her solicitors to say what she was relying on as ground for desertion, to which, through her solicitors, she replied on May 27, 1954, in these words: "My client does "not wholly rely upon the evidence given at the last hearing. "Apart from the notes 'Clear out' and 'Get out' signed by "your client, your client drove Mrs. Cooper from the matrimonial "home by expulsive words and conduct." There the matter stood when the case came on. The words "and conduct" are wide enough to drag in everything which had happened on the previous occasion, and did not illuminate the matter very much; but "expulsive words" is plain enough, and, on what we have been told, it was indicated quite plainly at the beginning of the hearing on the next day, May 28, 1954, that what was being relied on was the fact that the husband had used expulsive words not only in the two notes "Clear out" and "Get out," but also in the evidence to which I have already alluded, in which she had said that because he went on making such remarks (which might include both the time before and the time after the last note was written), she left. In other words, her case on desertion depended on expulsion by words, being told to "get out" in terms which were intended to be acted upon, which is a perfectly well established branch of the law relating to desertion. However, objection was at once taken that this was an attempt to re-open the other trial, under the guise of calling it desertion instead of cruelty. There was some argument, but it was suggested that it would be better to wait until some particular piece of evidence was formally tendered, and then take the objection, and that is what evidently happened, for Mr. Vick, who was conducting the case, promptly accepted the challenge by putting to the wife the note dated March 27, 1954, which was an exhibit in the first case. This was promptly objected to, and after argument on the case law on the subject the objection was upheld and the case was thrown out. This raises a much more difficult question than the other appeal, which was decided after hearing the evidence.

I am very anxious to avoid any sort of expression of opinion about the merits of this case, but I am firmly of opinion that the submission came too soon, and that the decision to hear no further evidence, or, indeed, to admit that evidence or any other evidence relating to expulsive words as the cause of the wife leaving home, was wrong, because it was premature. I am not in the least considering whether, at the end of the story when this evidence had been heard, the decision should be that way or the other way. I simply do not know; but in my opinion that course then adopted was wrong, and there is no escape from our ordering a re-hearing of the wife's charge of desertion.

I say that for these reasons. I do not want to go elaborately into authorities, but it seems to me that in essence this case is completely covered by a decision of this court in *Foster* v. *Foster*,[1] where the same sort of question arose, but in a much more complicated form. I do not propose to go through the details of the case beyond saying that instead of the same petty sessional division being concerned with the affairs of the spouses, the wife had failed in a charge of cruelty before one petty sessional division and had succeeded in a charge of desertion before another petty sessional division, and that there was unquestionably an overlap, which very often occurs, between allegations in support of a charge of cruelty and allegations in support of a charge of desertion.

It is true to say that when that case came on before the second set of justices there was no formal pleading of estoppel. There never is, in my experience, in magistrates' courts, in the way in which that issue would have to be raised in the High Court. But when the case came before us, on the principle that we were bound to deal with anything with which the justices ought to have dealt, we did treat the matter as if the plea of estoppel had formally been raised. I will read one short passage, first of all, from my own judgment,[2] for Collingwood J., although he added considerations of his own, expressly agreed with that judgment. I read first the paragraph which shows that we were dealing with the question of estoppel, and which, I think, indicates plainly enough how it was suggested that estoppel arose: "If the case before the Sutton justices"—(that is the second tribunal)—"had been an attempt to make a fresh charge "of persistent cruelty by including in the course of conduct "relied on an alleged incident of August 28, 1952, that is to say, "the day before her complaint to the Dorking justices, I should "be inclined to hold that she was estopped from re-opening that "charge." I pause at this moment to say that in so far as in *Bright* v. *Bright*,[3] to which we have been referred, Willmer J. held something of the same sort in relation to an attempt to introduce something fresh into the course of conduct of the same nature as that which had been put forward before and had not been introduced on the former occasion, and that the estoppel did operate against that, I respectfully agree, as this passage shows. Then I go on: "Obviously, the mere fact that there "was better and more detailed evidence, supported by independent witnesses of that incident, would be irrelevant. But at "Dorking,"—(that is the first hearing)—"of course, there was "no charge of desertion on September 4, 1952, before the court." Of course there was not, for this reason, if I may interpose parenthetically, that at Dorking complaint was made and the summons issued on August 29, 1952, which manifestly could not have included a charge of desertion on September 4, 1952. But I deal with that in the next sentence or two: "It is true that, "whether by amendment of the summons after she had left "home or by the issue of a fresh summons returnable at the same "time, all of which is a mere matter of machinery, desertion "could have been put before the Dorking justices on September 17, 1952." That is the date when that hearing took place. "But in my opinion the wife was not bound to put the charge "of desertion before the Dorking justices under the penalty of "being estopped from afterwards alleging that she had been "deserted before the date of that hearing." I had better add one or two passages from the next paragraph, for these considerations, in my opinion, apply to this case: "The matter "can, perhaps, best be tested by supposing, for the sake of "argument, that those steps had been taken, and that there "had been before the justices at Dorking on September 17, 1952, "both a charge of cruelty brought up to August 29, 1952, and "a charge of desertion from September 4, 1952. Would the "Dorking justices, having found that the charge of cruelty had "not been proved, have been bound to dismiss the charge of "desertion because it was an attempt to build up a charge of "constructive desertion by what was really a case of unproved "cruelty? In my opinion they would not, because of the evidence "which (I am assuming for the purposes of the argument) the "wife would have given as she gave it at Sutton about the "husband telling her that he had finished with her."

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[1] [1954] P. 67; [1953] 2 All E.R. 518.

[2] [1954] P. 67, 77.

[3] [1954] P. 270; [1953] 2 All E.R. 939.

Now, mutatis mutandis, though it may be that those observations in relation to *Foster* v. *Foster*[4] were obiter, though I think, in fact, that they went to the root of the decision, that applies a fortiori to this case, because on the first occasion the wife did give—(we do not have to assume that she gave)—the evidence about these expulsive notes, and, of course, in particular of the latest one, which was written five or six days before she left, and the repetition of it which she expressed in the words "He kept "on saying pack your bags and get out," and so she left; there was actual evidence of that.

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[4] [1954] P. 67.

It is said that the fact that that evidence was given on the first occasion operates as an estoppel per rem judicatam on the charge of constructive desertion. I have made it clear, I hope, that in my opinion that evidence was given as part of the background, and, in so far as it was specifically directed to any issue, was directed to the possible effect on her health. And it is said that because the justices threw her case out, they must have rejected that evidence. I am absolutely unable to accept that, for this if no other reason: that these were notes in the husband's own writing, which was never challenged, so that it was impossible for the justices to have rejected the fact that such things had been said, and said in writing; and I go further and say that it does not in the least follow from their rejection of her charge of persistent cruelty in which these notes were put in incidentally, or even with reference to the aspect of health, that because they dismissed her version of what happened in the married life they disbelieved that that particular thing had happened. That would be sheer speculation. The way to test that issue was to let the case go on, and to see what they did find about these notes in their proper context, namely, in connexion with a charge of desertion; and it is one of those unfortunate cases where both the advocates and the court struck too soon, with the result that the case was never heard.

I must say one further word on the law. It is said that this decision of ours in *Foster* v. *Foster*[4] has been distinguished and criticized by Willmer J. in *Bright* v. *Bright*.[5] I venture to observe that in so far as there is a difference between the two cases, and the principles on which they are decided, this court is bound, as indeed was Willmer J., by the decision in *Foster* v. *Foster*[6] if it is applicable. I do not propose to go through all the detail of the various matters which were used in connexion with the two charges of cruelty in *Bright* v. *Bright*[7] which had been dismissed by the commissioner, and the particulars which were given in support of the charge of desertion, save one only. It appears that one of the new allegations which had not been included in the dismissed petition for cruelty was an allegation in paragraph 13 that "between the years 1927 and 1930 at The "White House, Freetown, the respondent frequently told the "petitioner that he no longer wanted her, and wished that she "could go." If that allegation had been dealt with on the ground that it could not fairly be taken to be expulsive conduct, that would be one thing: but ruling it out as inadmissible, in spite of the fact that it had not been put before the court on the charge of cruelty, though it ought to have been put before the court on that charge, is another thing.

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[4] [1954] P. 67.

[5] [1954] P. 270.

[6] [1954] P. 67.

[7] [1954] P. 270.

I now refer to one passage in Willmer J.'s judgment[8]: "In "the result, I hold that so far as this petition raises the same "allegations as those put forward in the previous petition for "cruelty the wife is estopped from reiterating those allegations "in support of her plea of constructive desertion." So far, I have no comment or criticism to make; but it then goes on: "That decision covers paragraphs 14, 15 and 17, which, as I "pointed out, are paragraphs reiterating matters which formed "the subject of specific allegations and specific findings in the "previous case." Very good. "With regard to" (then he names three other paragraphs, of which one is No. 13, to which I have just referred, which raise matters not specifically raised in the previous proceedings) "it is clear to me that these "allegations could all well have been made as part of the cruelty "case which it was then sought to establish; indeed, one could "go further, and say from experience of this court that each of "them is of the type commonly raised in almost every cruelty "case which comes before this court." And then Willmer J. says that that brings it within the passage in Lord Shaw's opinion in *Hoysted* v. *Commissioner of Taxation*,[9] which had already been cited in full in support of the proposition that estoppel relates not only to acts which actually were raised and decided but to anything which ought to have been raised and was not raised, deliberately or otherwise, on the occasion before.

So far as that lays down that because, in the course of a charge of cruelty, matters may emerge or even be particularized suggesting that the husband wishes the wife to clear out, or even puts it plainer than that and tells her to clear out, the dismissal of the cruelty charge operates as an estoppel from using that class of evidence in support of a charge of constructive desertion, I respectfully disagree, and if that is the purport of that paragraph, as I think it is, I think that it conflicts essentially, though the details of the cases are different, with the decision of this court in the case of *Foster* v. *Foster*,[10] and I am not prepared to accept it.

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[8] [1954] P. 270, 287.

[9] [1926] A.C. 155; 42 T.L.R. 207.

We have been referred to the decision of Davies J. in *Hill* v. *Hill*,[11] which, it was suggested, showed that in similar circumstances a spouse in answer to a charge of constructive desertion or in making a charge of desertion was not allowed to plead matters which had been dismissed on a substantive charge of cruelty; and it was attempted to suggest that that excluded and prevented the respondent, so to speak, from saying that the spouse making the charge of desertion had consented to the separation. In fact, the case did nothing of the sort, because it is clear from the concluding page of the judgment that, so far from the issue being regarded as inadmissible, the judge very rightly admitted it, heard it, and decided that there was no evidence to support the allegation of consent.

For these reasons, whatever the merits of this charge of desertion may be, I think it must be tried, and that this appeal must be allowed.

KARMINSKI J. I agree, and so far as the wife's appeal on the question of cruelty is concerned I have nothing to add.

On the other appeal, I at once agree with all that has fallen from my Lord on the principle established by this court in *Foster* v. *Foster*,[12] a principle which is, of course, binding upon us, and the only difficulty I have encountered on the second appeal has been caused by some of the observations made by Willmer J. in the judgment in *Bright* v. *Bright*[13] to which my Lord has already referred.

So far as *Foster* v. *Foster*[14] is concerned, my Lord has read the passage from his judgment, and I do not desire to read it again. Collingwood J., who agreed with the judgment of my Lord in that case said, in expressing his agreement[15]: "I agree with "what Lord Merriman P. has said, that this is not a question of "res judicata. It is not estoppel, because the issue before the "Sutton justices was an issue different from that before the "Dorking justices."

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[10] [1954] P. 67.

[11] [1954] P. 291; [1954] 1 All E.R. 491.

[12] [1954] P. 67.

[13] [1954] P. 270.

[14] [1954] P. 67.

[15] Ibid. 78.

The facts which this court had to consider in *Bright* v. *Bright*[16] were, of course, quite different from those in the present case; but the principle, as I understand it, is common to both. *Bright* v. *Bright*,[16] the decision of Willmer J., was dealing with quite different and, indeed, very unusual circumstances. In that case there had been a very long history of litigation between the parties, and the first complaint of cruelty made by the wife went back as far as 1913, almost precisely 40 years before Willmer J. had to deal with what I may perhaps colloquially call the last round in the litigation. In the course of his judgment on the wife's case of simple desertion the judge pointed out that the petition was launched some 22 years after some of the events complained of.

My Lord has referred to the difficulties which may have been caused by some of the language used by Willmer J., and I would say at once that I agree with my Lord that if Willmer J. meant that the dismissal of a cruelty charge in effect operated to estop the wife from using any of the same facts as evidence of desertion, then that is in flat contradiction of the decision of this court in *Foster* v. *Foster*.[17] I agree with my Lord that that is a possible construction of what Willmer J. said. I do not think, however, that it is necessarily the only construction. I observe with interest, and, if I may say so, with sympathy, that the judgment of Willmer J. came, after a hearing of several days, on July 31, 1953; and, as he pointed out in his judgment, he was naturally anxious to dispose of a matter in which a number of witnesses had been brought from West Africa. One can well understand that however much he might have preferred to reserve his judgment he felt himself unable to do so over the long vacation. I think that a possible explanation is that the passage which my Lord has read does not necessarily express exactly what the judge had in mind.

However, I am satisfied, as I have already said, that the principle applicable here is precisely that laid down by this court in *Foster* v. *Foster*.[17] Here the justices, on a submission made by counsel for the husband, ruled against evidence of the wife being admitted, and, as they put it, "Upon the wife tendering "such evidence in her examination-in-chief the husband objected "and we upheld the objection." The precise reason for the justices upholding the objection is not very apparent, since they went on to say: "In view of our ruling the wife was not in a

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[16] [1954] P. 270.

[17] [1954] P. 67.

"position to give any evidence which can be accepted as admissible to support her contention, and we therefore dismissed the "summons." That last sentence, as I understand it, is a reiteration of, if not a reason for, their rejection of the wife's tendered evidence.

In the result, I think that the position in this case is that the wife has not been able to put forward her complaint of desertion or, with it, a complaint of wilful neglect to provide reasonable maintenance, but that the justices shut her out on the threshold of the hearing of her complaint. What her merits are I do not know and cannot tell, but I agree that they must at least be investigated and that this case must be remitted for a rehearing.

First appeal dismissed.
Second appeal allowed.
Case remitted for re-hearing.

Solicitors: *R. Crane; Craigen, Hicks & Co.*

J. B. G.

1954
Oct. 20;
Nov. 16.

Davies J.

DUNNE *v.* SABAN.

Husband and Wife—Divorce—Conflict of jurisdiction—Foreign decree based on residence—Dissimilar English jurisdiction—Whether foreign decree valid—Parties domiciled in England—Comity—Matrimonial Causes (War Marriages) Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 43)—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 18.
Conflict of Laws—Jurisdiction.

A wife resident in Florida, whose husband was then resident and domiciled in England, obtained a divorce in a court in that State. The jurisdiction of that court was said to be based on residence of 90 days and domicile, the wife being able under American law to acquire a domicile separate from that of her husband. On a petition by the husband for a declaration that the marriage had been validly dissolved:—

Held, (1) that, although the fundamental principle of English law, that the only court competent to dissolve a marriage was that of the domicile, had been relaxed in English courts by certain statutory provisions in respect of a wife whose husband had a domicile abroad, those statutory provisions were exceptions, and apart from those exceptions the rule that domicile was the test of jurisdiction in divorce remained.

(2) That as the parties were domiciled in England at the time

of the divorce in Florida, that divorce was invalid in English law and the marriage had not therefore been dissolved.

Per curiam: The observations in *Travers* v. *Holley* [1953] P. 246, 255; [1953] 2 All E.R. 794 as to the recognition in certain circumstances of foreign decrees founded upon a jurisdiction similar to ours were directed to a case where the extraordinary jurisdiction of the foreign court corresponded almost exactly with the extraordinary jurisdiction exercisable by this court.

PETITION by husband for a declaration that his marriage in 1950 in England had been validly dissolved by a decree of dissolution pronounced on November 3, 1953, in the Circuit Court of the Fifteenth Judicial Circuit in and for Broward County, State of Florida, in Chancery.

The following statement of facts is taken from the judgment: The parties were married in this country on February 4, 1950, and they were then each 21 years old. The husband was born in this country and had lived, save for service abroad in the forces, all his life in this country. There was no question but that his domicile of origin was English. In June, 1951, a little over 12 months after the marriage, he and his wife decided to emigrate to the United States of America, whither his wife's mother and father had gone about 12 months previously. The husband and wife went to America and arrived in that country on or about June 26, 1951, going to Hollywood, Florida, where the wife continued to reside. The husband soon obtained very remunerative employment; but the parties were not happy together, and some time before the husband eventually left the United States the wife had actually gone to live with her parents. In June, 1952, the wife applied for naturalization without the consent or, indeed, the knowledge of her husband.

The court was satisfied on the evidence that when the husband went to America in 1951 he abandoned his English domicile of origin and the parties acquired a domicile of choice in Florida. The husband, however, decided that he was going to leave America and return to England, and he came back towards the end of 1952, intending to reside here permanently. It was held that he had abandoned his domicile of choice in Florida and had reverted to his English domicile of origin.

According to his evidence the wife refused to come back with him, and made it plain that she was going to stay in the United States of America and that she refused to come with him at any time. He wrote on two occasions to her from England asking her to come back, but she did not reply.

After his return to England the husband was served with certain documents from the Florida court. The first, dated July 20, 1953, was called a " notice to appear." It was addressed to the husband informing him that: " You are hereby notified " that a suit for divorce has been instituted against you in the " Circuit Court of the Fifteenth Judicial Circuit, in and for " Broward County, Florida, entitled: Marie Vaughan Dunne, " plaintiff, vs. Peter John Dunne, defendant, and you are hereby " required to serve upon J. Herbert Burke, plaintiff's attorney, " Hollywood Building, . . . your written defences to the bill of " complaint herein on or before August 25, 1953, in this cause; " otherwise a decree pro confesso will be entered against you. " The relief sought by this suit is a divorce upon the grounds set " forth in said bill of complaint." In paragraph 1 of the bill of complaint, which was sent with the notice to appear, it was stated: " Plaintiff is a resident of the city of Hollywood, county " of Broward, State of Florida, and has been an actual bona fide " resident of Broward county, Florida, for more than ninety (90) " days last prior to the filing of this bill of complaint for divorce." It stated that the defendant was a non-resident and gave the date of the marriage. After setting out various alleged acts of cruelty, it alleged: " Defendant left for England shortly thereafter and " made no arrangements for the plaintiff to return to England to " join him and stated that he did not intend to see the plaintiff " again." The document concluded: " Plaintiff by reason thereof " charges defendant with extreme cruelty." The husband was also served with an " Affidavit for service by publication " dated July 17, 1953. He took no part in those proceedings. In an affidavit by the wife in the present proceedings she stated that she had been legally admitted to the United States for permanent residence on June 26, 1951, and had applied for naturalization on June 24, 1952.

There was also in evidence a copy of the decree of the American court. This copy was subsequently obtained by the husband's solicitors, but the decree had never actually been served on the husband. The decree stated: " Ordered, adjudged and decreed " as follows: That the report of the special master and his " findings of fact and of law, and his recommendations be and " the same are hereby ratified and confirmed. That the court " has jurisdiction of the subject-matter and the parties to this " cause. That Marie Vaughan Dunne, plaintiff herein, is a " bona fide resident of the State of Florida and was a bona

" fide resident of that State of Florida for more than ninety (90) " days continuously immediately next prior to the filing of her " bill of complaint in this cause. That Peter John Dunne, defen- " dant herein, is guilty and has been guilty of extreme cruelty " exhibited directly to and against Marie Vaughan Dunne, plain- " tiff herein, and the evidence has established such extreme " cruelty, and the evidence as to the jurisdictional fact of " residence of Marie Vaughan Dunne, plaintiff herein, has been " corroborated. That the bonds of matrimony now and heretofore " existing between Marie Vaughan Dunne and Peter John Dunne, " plaintiff and defendant, be and the same are hereby dissolved, " and the parties hereto are hereby divorced each from the other " a vinculo matrimonii. All of the rights and privileges of single " persons be and they are hereby restored upon each of the " parties hereto. That the plaintiff, Marie Vaughan Dunne, be " allowed to resume the name of 'Marie Vaughan Saban' (her " maiden name)."

P. R. Hollins and *M. H. Jackson-Lipkin* for the husband petitioner. The court has power to make a declaration that the marriage has been validly dissolved by the Florida decree: *Har-Shefi* v. *Har-Shefi*.[1] Although at one time domicile was the sole test of jurisdiction in divorce, that principle has been relaxed in our courts since section 13 of the Matrimonial Causes Act, 1937 (now section 18 (1) (*a*) of the Act of 1950) gave jurisdiction in respect of a petition by a wife in cases where the parties had been domiciled in England immediately before the desertion or deportation of the husband who had later changed his domicile. It was further relaxed by the Matrimonial Causes (War Marriages) Act, 1944, and by section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now section 18 (1) (*b*) of the Act of 1950).

The question arose in *Travers* v. *Holley*[2] whether the English courts would recognize the decree of a foreign court in cases where the legislature of the country had made provision for divorce on the petition of a wife who was not (in the English sense of the word) domiciled in that country when the proceedings were instituted. That principle was accepted by the Court of Appeal upon the basis that it would be contrary to principle and inconsistent with comity if the courts of this country refused recognition in such cases.

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[1] [1953] P. 161; [1953] 1 All E.R. 783: (No. 2); [1953] P. 220; [1953] 2 All E.R. 373.

[2] [1953] P. 246; [1953] 2 All E.R. 794.

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English courts now recognize ordinary residence in the country as a ground for jurisdiction; and although the length of residence upon which the Florida court based its jurisdiction was only 90 days, it is submitted that the test of residence is essentially the same and that, applying to the present case the views expressed in *Travers* v. *Holley*,[2] the decree of the Florida court should be recognized in this country as it is throughout the United States.

[DAVIES J. But there is a great difference between residence of three years and residence of 90 days. What if the test of jurisdiction in the foreign court were only one day?]

Paul Wrightson for the Queen's Proctor. It has long been accepted in our courts that a wife's domicile follows that of her husband and that a wife cannot acquire a domicile of her own. Subject only to certain statutory exceptions, domicile is the only test in England of jurisdiction in divorce, and bona fide residence alone, apart from those exceptions, cannot give our courts such jurisdiction. [Reference was made to *Le Mesurier* v. *Le Mesurier*[3]; *Lord Advocate* v. *Jaffrey*[4]; *Sassen* v. *Sassen*[5]; *Attorney-General for Alberta* v. *Cook*[6] and *Salvesen or von Lorang* v. *Administrator of Austrian Property*.[7]]

There is no statutory provision for the recognition in this country of the power of a foreign court to dissolve a marriage if the parties are domiciled in England; but if the observations in *Travers* v. *Holley*,[8] which are obiter in view of the finding of fact in that case, are accepted, and if as a result certain foreign decrees are to be recognized here as a matter of comity although the parties were domiciled in England at the time, it is submitted that such decrees should only be recognized where the foreign jurisdiction is based upon principles identical with our own, such as three years' ordinary residence; decrees such as the present one, based on a residential test of a much shorter period, should not be recognized.

DAVIES J. referred to the nature of the declaration sought and said: The competence of this court to entertain a petition of this nature was established by the recent decision of the Court of Appeal in *Har-Shefi* v. *Har-Shefi*,[1] in which the petition was finally heard by Pearce J.[2]

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[2] [1953] P. 246.
[3] [1895] A.C. 517; 11 T.L.R. 481.
[4] [1921] 1 A.C. 146.
[5] [1924] A.C. 1007.
[6] [1926] A.C. 444; 42 T.L.R. 317.
[7] [1927] A.C. 641; 43 T.L.R. 607.
[8] [1953] P. 246.
[1] [1953] P. 161.
[2] [1953] P. 220.

This case first came on for hearing before me as an undefended petition on October 20, 1954. Evidence was given by the husband and by an expert in American law, Mr. James Lawrence McDonnell. I should like to say at once with regard to Mr. McDonnell that I derived the greatest help from his evidence. I thought that he was one of the best and most helpful expert witnesses on law whom I have ever heard. After hearing argument from Mr. Hollins, who was appearing for the husband, I came to the conclusion that the matter was one of some difficulty and that it would not be right for me to decide the case without argument on both sides. I therefore referred the case to Her Majesty's Proctor, for whom Mr. Wrightson appeared yesterday when the case came before me for further hearing.

The facts in this case are not in dispute though the law may be a little more difficult. I should have liked, had I the opportunity, to have had further time to consider it, but as no doubt Mr. Dunne wishes to have this matter decided one way or the other with reasonable celerity, and as I am due to go away on circuit tomorrow, I thought it right that I should deliver my judgment this morning.

[His Lordship stated the facts substantially as set out above, and said that whatever the position might be in American law (for the expert evidence showed that American law recognized the possibility of a wife and husband having different domiciles) by English law there was no doubt that when the husband returned to England, both he and his wife reverted to an English domicile. Referring to the charges of alleged cruelty, his Lordship said that it was not necessary to express an opinion about them, but that the allegations did not appear to him to be of "extreme" cruelty. His Lordship continued:] The present petitioner husband not unnaturally wants to know where he stands and has brought this petition, dated May 31, 1954, for a declaration that that divorce was valid and that the marriage was validly dissolved by the decree to which I have just made reference.

There was really very little dispute between Mr. Hollins, for the husband, and Mr. Wrightson, for the Queen's Proctor, as to the law as it existed up to 1937; indeed, there could be very little dispute about it. A certain number of leading authorities were cited to me: *Le Mesurier* v. *Le Mesurier*,[3] *Lord Advocate*

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[3] [1895] A.C. 517.

v. *Jaffrey*,[4] *Attorney-General for Alberta* v. *Cook*,[5] and *Salvesen or von Lorang* v. *Administrator of Austrian Property*.[6] It is not necessary to refer to those various authorities. Suffice it to say that there are two propositions established beyond peradventure by those and other well known cases. The first is that the English courts take the view that the only court which can validly dissolve a marriage (and I emphasize that, because we are talking now about dissolution and divorce and not about any other matrimonial proceedings) is the court of the domicile of the parties. The second proposition is that by our law the domicile of the wife follows that of the husband and that the wife cannot have a domicile different from that of the husband.

Those propositions were not disputed by Mr. Hollins, but he submitted that that fundamental principle has been relaxed consequent upon various statutory exceptions which have been introduced into our law, starting in 1937. The reference to 1937 is, of course, a reference to section 13 of the Matrimonial Causes Act of that year, the substance of which is now contained in section 18 (1) (*a*) of the 1950 Act. I do not think that I need refer to section 13 of the 1937 Act in detail, though Mr. Hollins referred first of all to that section. He then pointed out that in addition to that departure from the strict application of the domicile principle, there was also the special provision contained in the Matrimonial Causes (War Marriages) Act, 1944, and finally that contained in the section to which I have just referred, section 18 of the Matrimonial Causes Act, 1950. That section provides as follows: " Without prejudice to any jurisdiction exercisable by " the court apart from this section, the court shall by virtue of " this section have jurisdiction to entertain proceedings by a " wife in any of the following cases, notwithstanding that the " husband is not domiciled in England, that is to say . . . (*b*) in " the case of proceedings for divorce or nullity of marriage, if " the wife is resident in England and has been ordinarily resident " there for a period of three years immediately preceding the " commencement of the proceedings, and the husband is not " domiciled in any other part of the United Kingdom."

Going back a little, it is perhaps worth remembering that in the Matrimonial Causes (War Marriages) Act, 1944, it was provided by section 1 (2) " that this section shall not apply to " any marriage if, since the celebration thereof, the parties

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[4] [1921] 1 A.C. 146.

[5] [1926] A.C. 444.

[6] [1927] A.C. 641.

"thereto have at any time resided together in the country in "which the husband was domiciled at the time of the marriage." That is to say that the special right given to a wife by the Matrimonial Causes (War Marriages) Act, 1944, to proceed in this country when the husband was domiciled elsewhere, was lost at once if at any time she resided with him in the country of his domicile. To my mind, that does not suggest that at that time the legislature was abandoning entirely the principle of domicile.

Mr. Hollins' contention, in a nutshell, is this: these invasions of the principle of domicile as the sole test of jurisdiction to dissolve marriage show that the legislature is prepared to authorize the courts here to dissolve marriages in cases where the wife is resident in this country although the husband is not domiciled here and, therefore (he contends), this court must recognize the right of a court of a foreign country to exercise jurisdiction where the wife is resident there despite the fact that the husband is domiciled elsewhere.

The contrary argument, also put shortly, is this: if the legislature had been minded to abandon the principle of domicile and to grant to this court the right to dissolve, and to recognize the right of foreign courts to dissolve, a marriage in cases where the parties were, or the wife was, merely resident but not domiciled in the jurisdiction, it would have been a simple thing to have said so. One would not expect the legislature to pass an Act relating to the competence of foreign courts; but it could have done so generally with regard to this court, and it has not done so. In every case where this extraordinary jurisdiction has been given to the court it has been confined within strict limits, and except in cases which fall within those limits the principle of domicile is still in full force and effect.

The only case to which I need refer is the recent decision in the Court of Appeal, *Travers* v. *Holley*.[7] I need not go through the whole of that case in detail. The point at issue was this, that there was in force at the relevant time an Act of New South Wales called New South Wales Matrimonial Causes Act, No. 14, 1899, which though by no means in precisely the same terms was in very similar terms to our section 13 of the Matrimonial Causes Act, 1937, to which I have already referred. The Court of Appeal discussed in *Travers* v. *Holley*,[7] as will appear in a moment, the question whether our courts would recognize the right of the New South Wales court under the statute of

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[7] [1953] P. 246.

1899 to entertain a suit for divorce when the jurisdiction depended on residence of three years and upwards. I say that the question was discussed, because the discussion was plainly obiter. Mr. Commissioner Grazebrook had found that the divorce pronounced by the New South Wales court was an invalid divorce, and consequently that the wife, who had re-married after that divorce, was guilty of adultery. In the Court of Appeal the majority of the court, Somervell and Hodson L.JJ., found that the husband was at the relevant time domiciled in New South Wales and therefore, statute or no statute, that the New South Wales court obviously had jurisdiction to dissolve the marriage. They held that the marriage had therefore been validly dissolved and that the wife, who married thereafter, had therefore not committed adultery. But in addition to holding on the evidence that the husband was domiciled in New South Wales, and that the New South Wales court therefore had jurisdiction, the Court of Appeal went on to discuss whether or not the English court would recognize and acknowledge the right of the New South Wales court to pronounce a decree under the jurisdiction given to it by what, for convenience, I will call the three years' residence statute.

I think that the most convenient passage to refer to in that discussion is in the judgment of Hodson L.J., who said[8]: "The argument is that domicile of both spouses at the "time of the proceedings is the sole test of jurisdiction in "divorce: see *Le Mesurier* v. *Le Mesurier*,[9] which unequivocally "established this test. Since the decision in that case the "English courts have not recognized a decree of a foreign court "unless the parties were at the time of the proceedings domiciled "in the jurisdiction of the foreign court, or, if domiciled else-"where, such decree would be recognized by the law of the "domicile: *Armitage* v. *Attorney-General*.[10] For this purpose "New South Wales is a foreign court, and, it is said, the husband "not being domiciled in New South Wales in August, 1943, the "courts of this country will not recognize the decree of the court "of that State.

"I think that this argument is not valid at the present day. "For many years after the decision in *Le Mesurier's* case[11] the "position was that the courts of this country only exercised "jurisdiction in cases where both parties were domiciled here.

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[8] [1953] P. 246, 255.

[9] [1895] A.C. 517.

[10] [1906] P. 135; 22 T.L.R. 306.

[11] [1895] A.C. 517.

"Following certain dicta of Sir Gorell Barnes in *Ogden* v. "*Ogden*,[12] there was thought to be an exception to this rule in "the case of wives deserted by husbands who at the time of the "desertion were domiciled in England. It was thought that "they might obtain a decree in this country although this "country was not the true domicile of the husband. In "undefended cases these courts did not inquire what had "happened to husbands after desertion in such circumstances, "either because it was thought they were estopped from denying "an English domicile or because the burden was upon them to "show an abandonment and they had done nothing to discharge "the burden.

"When the question was raised in a defended case, however, "the decision was against the view that there was any exception "to the rule: *H.* v. *H.*[13] Indeed, the supposed exception had "been adversely criticized in *Attorney-General of Alberta* v. "*Cook.*[14] The position has, however, been radically altered by "statute. By the Matrimonial Causes Act, 1937, s. 13, it was "provided that 'where a wife has been deserted by her husband "' . . . and the husband was immediately before the desertion "' . . . domiciled in England and Wales, the court shall have "'jurisdiction for the purpose of any proceedings' concerned "with divorce. Since 1937 this exception has been largely "extended, first by the Matrimonial Causes (War Marriages) "Act, 1944 (a temporary war measure), and later by the Matri-"monial Causes Act, 1950, s. 18. It is unnecessary to consider "the effect of these later statutory provisions since, at the "material time, when the New South Wales proceedings were "instituted, the Act of 1937 was in force and section 13 of this Act "corresponds in substance with the provision under which the "New South Wales court claimed jurisdiction between the "parties to this appeal.

"It seems to me, therefore, that Parliament has cut the "ground from the argument put forward on behalf of the husband. "If English courts will only recognize foreign decrees of divorce "where the parties are domiciled in the territory of the foreign "court at the time of the institution of proceedings, because "that is the jurisdiction which they themselves claim, what is "the situation when the courts of this country arrogate to them-"selves jurisdiction in the case of persons not domiciled here at

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[12] [1908] P. 46, 82; 24 T.L.R. 94.

[13] [1928] P. 206; 44 T.L.R. 711.

[14] [1926] A.C. 444.

"the material date? It must surely be that what entitles an "English court to assume jurisdiction must be equally effective "in the case of a foreign court.

"Lord Watson, in the *Le Mesurier* case, used the following "language[15]: 'A decree of divorce a vinculo, pronounced by a "'court whose jurisdiction is solely derived from some rule of "'municipal law peculiar to its forum, cannot, when it trenches "'upon the interests of any other country to whose tribunals "'the spouses were amenable, claim extra-territorial authority.' "Conversely, it seems that where it is found that the municipal "law is not peculiar to the forum of one country but corresponds "with a law of a second country, such municipal law cannot "be said to trench upon the interests of that country. I would "say that where, as here, there is in substance reciprocity, it "would be contrary to principle and inconsistent with comity if "the courts of this country were to refuse to recognize a jurisdiction which mutatis mutandis they claim for themselves. "The principle laid down and followed since the *Le Mesurier* "case[16] must, I think, be interpreted in the light of the legislation "which has extended the power of the courts of this country in "the case of persons not domiciled here."

Mr. Hollins, for the husband petitioner, here argues therefore that as this court has the right by statute to dissolve marriages on the petition, for example, of a wife resident in this country when the husband is domiciled elsewhere, so we must recognize the right of foreign courts, consequent upon the decision of the Court of Appeal in *Travers* v. *Holley*,[17] to do likewise. But, as I think, the real question is: does the foreign court do likewise? It seems to me that the observations of the Court of Appeal (Somervell L.J. agreed in substance, as, indeed, did Jenkins L.J., with Hodson L.J.) were directed to a case where the extraordinary jurisdiction (I use that as meaning out of the ordinary jurisdiction) of the foreign court corresponds almost exactly with the extraordinary jurisdiction exercisable by this court. One may say, frivolously, that it is an application of the "sauce for the "goose is sauce for the gander" principle. But I am far from being satisfied in the present case that the jurisdiction exercisable by the Florida court is anything like the jurisdiction of this court. I have already referred to the proceedings in the Florida court, where jurisdiction on the face of the document appears to be founded on actual bona fide residence for more than 90 days. Mr. McDonnell, in his most helpful evidence, told me that all other American courts would under Article IV of the Constitution give full faith and credit to the decree of the Florida court, but he said that residence is construed to mean domicile. He said: " Residence as it appears in the State " Statutes—and in the Florida statute the word ' residence ' is " used—is construed to mean ' domicile,' my Lord, but it is dis- " tinct from the statutory period of 90 days." I said, " What do " you mean by that? " and he said, " That there is a requirement " that the plaintiff be physically present in the State as well as " being domiciled there." I said " You mean to found jurisdiction " there has got to be domicile plus 90 days' residence?" and his answer was " Yes, my Lord." Mr. Hollins asked a question, and summing it up said, " I think it is what his Lordship has " just said. Is it two things: ' domicile plus 90 days' resi- " ' dence?' and he said ' Yes.' ". Then he went on to say that all American States recognized the right of a wife to establish a domicile separate from that of her husband. He also made it plain that requirements of different States varied. Florida, the State under consideration, requires 90 days; I think that some other State in America was mentioned which had a requirement of 60 days. There was one country mentioned by Mr. McDonnell in his evidence, namely, Mexico, where apparently one day's residence was sufficient. I do not think that even Mr. Hollins would suggest that this court would be bound to recognize the jurisdiction of a court which presumed to dissolve a marriage on the faith of one day's residence. I think that that extreme case points the difficulty which faces the petitioner here.

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[15] [1895] A.C. 517, 528.

[16] [1895] A.C. 517.

[17] [1953] P. 246.

Travers v. *Holley*[17] deals with a case where the foreign court's jurisdiction depended on three years' residence, as does ours in similar circumstances. What is the court to do when it is faced with a case of this kind? How is it to draw the line? Three years is all right because we exercise a similar jurisdiction. Is two years all right or is it too short? Is 12 months, 90 days, 60 days, one day, all right? How is one to draw the line and where is one to fix the standard? It seems to me that that is a matter of impossibility unless there is some statutory yardstick by which one can measure what is reasonable residence from our point of view.

But I think that this case falls to be decided on a narrower ground than upon general considerations of that kind. I think that Mr. Wrightson's argument for the Queen's Proctor was plainly right. It seems to me that the statutory exceptions to the law regarding domicile as being the test of the jurisdiction to dissolve a marriage are exceptions, and that the rule, apart from those exceptions, remains in full force. In my judgment the observations in *Travers* v. *Holley*[17] decide that this court will recognize the right of foreign courts to encroach upon the principle of domicile only to the extent to which this court also does. Where, as here, you find a court purporting, no doubt completely properly according to the laws of Florida, to exercise jurisdiction upon 90 days' residence, even though that is coupled with something that we do not recognize, namely, a separate domicile of the wife in the United States, the only possible answer which this court can give is to say that the decree of that foreign court was in our law invalid.

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[17] [1953] P. 246.

In those circumstances, all that I can do is to dismiss this petition, with the result, of course, as was discussed in argument yesterday, that the husband here will either have to wait for the expiration of the statutory triennium and then take proceedings on the ground of desertion or else, if Mrs. Dunne, or Miss Saban —whichever she calls herself now—has re-married, to commence proceedings here on the ground of adultery. But that is no concern of mine. The petition, therefore, will be dismissed.

Petition dismissed.

Solicitors: *Rowe & Maw, for Clutterbuck, Trevenen & Mawson, Carlisle; the Queen's Proctor.*

J. B. G.

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[17] [1953] P. 246.

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Dec. 6, 7, 8, 15.

Sachs J.

BROOME *v.* BROOME (EDMUNDSON CITED).

Crown—Privilege—Evidence—Witness—Production of documents—Oral evidence of witness under subpoena—Certificate in "blanket form."

Crown privilege can attach to documents which have either emanated from, or have properly come into the possession of, some servant or agent of the Crown; and where the Crown is in physical possession of a document that normally of itself results in the Crown being able to claim privilege.

Semble, secondary evidence of the contents of documents sent in the normal course of communication by or to servants of the Crown or their agents would also be privileged, although *quaere* the position where the Crown is a mere bailee.

Duncan v. *Cammell Laird & Co. Ld.* [1942] A.C. 624; 58 T.L.R. 242; [1942] 1 All E.R. 587; *Ankin* v. *London and North Eastern Railway Co.* [1930] 1 K.B. 527; 46 T.L.R. 172; *Ellis* v. *Home Office* [1953] 2 Q.B. 135; [1953] 2 All E.R. 149; and dicta in *Moss* v. *Chesham U. D. C.* (unreported), January 16, 1945, applied.

But it is of obvious importance to ensure generally that claims of Crown privilege are not used unnecessarily to the detriment of the vital need of the courts to have the truth put before them; and the courts would consider carefully before conceding to the Crown a general power wholly to suppress evidence from every source upon the unexaminable opinion of a Minister as to what that Minister regarded as the public interest.

A wife in a contested suit for divorce caused a subpoena ad testificandum to be served on a person who was at the material time a representative of the Soldiers', Sailors' and Airmen's Families Association in Hong Kong. It appeared that the representative might be asked to give evidence of general matters as well as of matters relevant to the question of negotiations for a reconciliation between the parties. The petitioner also caused a subpoena duces tecum to be served on the Secretary of State for War relating to letters, memoranda and records made by the association concerning the parties. The documents were assumed to have come properly into the possession of the War Office and not to have been lodged solely for the purpose of a claim of privilege being made. The Secretary of State for War issued a certificate stating that having read the correspondence and considered the evidence which the representative could give he was "of opinion that it was not in the public interest that the "documents should be produced or the evidence of [the representative] given orally":—

Held, (1) that so far as the documents were concerned, they were protected by Crown privilege.

(2) That even if it were within the competence of a Minister of the Crown to prevent a witness giving evidence on some set of facts or class of facts, it was wrong to adopt a procedure which would prevent a witness giving any evidence whatsoever of any sort. The application to set aside the subpoena ad testificandum would, if granted, have prevented the witness giving evidence on any fact, whether or not it was one against the public interest to disclose. A certificate in "blanket form" would, moreover, be contrary in principle to cases which enjoined Ministers before giving a certificate as regards documents to examine each in turn in the light of the issues arising in the case.

(3) The form of the certificate being such that it was impossible to ascertain from its wording the nature of the evidence for which privilege was being claimed, and an adjournment for the purpose of obtaining a further certificate being declined, it was not open

to the Crown to listen to each question in turn and take on that question such objection as might seem right.

Ellis v. *Home Office* [1953] 2 Q.B. 135 distinguished.

DEFENDED PETITION for divorce.

By her petition dated August 12, 1953, a wife sought the dissolution of her marriage on the ground of her husband's cruelty. She alleged, inter alia, as acts of cruelty certain behaviour of the husband in 1951 when she joined him in Hong Kong, where he was then serving as a sergeant in the Army. The husband, by his answer, dated November 19, 1953, denied the charges of cruelty and subsequently by an amendment dated October 4, 1954, alleged that the wife had committed adultery, and cross-prayed for a divorce.

On December 10, 1953, the wife caused a subpoena ad testificandum to be served upon a Mrs. Allsop, who at the time of the wife's visit to Hong Kong was the sole representative of the Soldiers', Sailors' and Airmen's Families Association (S.S.A.F.A.) in Hong Kong. On November 12, 1954, the wife caused to be served upon the Secretary of State for War a subpoena duces tecum requiring him to bring " All letters received by, copies " of letters sent by and memoranda and records made by the " Soldiers', Sailors' and Airmen's Families Association con-" cerning the [wife] and the [husband]."

The Secretary of State for War thereupon issued a certificate dated November 29, 1954, stating: " I have read the correspon-" dence and notes covered by the subpoena issued to me dated " November 12, 1954, and I have considered the evidence which " Mrs. Gwenneth Mary Allsop could give, as set out in a state-" ment taken from her and submitted to the Treasury Solicitor " . . . and I am of opinion that it is not in the public interest " that the documents should be produced or the evidence of " Mrs. Allsop given orally."

Application was made on behalf of the Crown at the beginning of the hearing to have both subpoenas set aside; argument upon the matter was, however, deferred until the witness Mrs. Allsop was called to the witness box—but before she took the oath.

The case is reported solely upon the questions of privilege claimed by the Crown.

Percy Hollins for the wife. In view of the Minister's certificate, and the fact that the documents concerning the relations between the parties which were formerly in the possession of

S.S.A.F.A. are now in the possession of the War Office, it is conceded upon the authority of *Duncan* v. *Cammell Laird & Co. Ld.*[1] that production of those documents cannot now be forced, and that the Minister's certificate is final. But it is submitted that there is no authority for the proposition that the entire evidence of a witness can be excluded by a Minister issuing his certificate in general form. Such a procedure would be contrary to the requirement that a Minister should scrutinize the evidence for which privilege is claimed before issuing such certificate. It is not disputed that the principles in *Mole* v. *Mole* [2] are applicable to any matters in issue in which the S.S.A.F.A. representative played a part; but it is submitted that no privilege can be claimed which is wider than that relating to negotiations for a reconciliation, which is a privilege which can be waived by the parties themselves.

Rodger Winn for the Crown. It is conceded that S.S.A.F.A. is an independent body, so constituted by its charter, and that its staff are neither servants nor agents of the Crown. Nevertheless, the Crown is entitled to claim privilege in respect of documents which have come into existence through the activities of S.S.A.F.A. in so far as they contain matter the publication of which would prejudice the public interest. [Reference was made to *Duncan* v. *Cammell Laird & Co. Ld.*,[3] *Ellis* v. *Home Office*,[4] *Ankin* v. *London and North Eastern Railway Co.*[5] and *Moss* v. *Chesham U. D. C.*[6]] In this case the documents are in the possession of the War Office; but the Crown could claim privilege even if they were in the custody of others. Further, where documents are subject to Crown privilege secondary evidence of the contents of those documents must also be privileged. *Ankin* v. *London and North Eastern Railway Co.*[7] is authority for both propositions. To contend otherwise would be to ignore the basis of the claim of privilege, namely, the protection of the public interest.

As to the setting aside of the subpoena ad testificandum, it is submitted that Crown privilege attaches to any facts whatsoever sought to be given in evidence the disclosure of which would be contrary to public interest. There is no direct authority on this point, but reliance is placed on the dictum of Viscount Simon L.C.

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[1] [1942] A.C. 624; 58 T.L.R. 242; [1942] 1 All E.R. 587.

[2] [1951] P. 21; 66 T.L.R. (Pt. 2) 129; [1950] 2 All E.R. 328.

[3] [1942] A.C. 624.

[4] [1953] 2 Q.B. 135; [1953] 2 All E.R. 149.

[5] [1930] 1 K.B. 527; 46 T.L.R. 172.

[6] (Unreported) January 16, 1945.

[7] [1930] 1 K.B. 527.

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in *Duncan* v. *Cammell Laird & Co. Ld.*,[8] in which, after holding that privilege attached to the documents in that case, it was stated that "the same principle must also apply to the exclusion "of oral evidence which, if given, would jeopardize the interests "of the community." If Crown privilege be held to attach to the evidence of the S.S.A.F.A. representative the correct procedure is that the subpoena should be set aside: *Rex* v. *Baines.*[9] The certificate of the Minister that the public interest is affected is conclusive and not justiciable (cf. *Duncan* v. *Cammell Laird & Co. Ld.*[10]), but the Minister is prepared to attend the court should it be desired to confirm merely that he has given personal consideration to the relevant matters.

Cur. adv. vult.

December 15. SACHS J. referred during the course of his judgment to the application to set aside the subpoenas and said: At this stage it is convenient to refer to a point of general interest which arose when counsel for the wife called to the witness box one Mrs. Allsop, who, at the material times, was the sole representative of the Soldiers', Sailors' and Airmen's Families Association in Hong Kong—which I will refer to by its usual abbreviation of S.S.A.F.A. The solicitors for the wife had caused to be issued two subpoenas. The earlier of these was a subpoena ad testificandum directed to Mrs. Allsop and dated December 10, 1953; the second a subpoena duces tecum addressed to the Secretary of State for War and relating to letters, copies of letters, memoranda and records made by S.S.A.F.A. concerning the petitioner and respondent. Mr. Rodger Winn, instructed by the Treasury Solicitor, had immediately before the opening of the case applied to me to set aside both these subpoenas—rightly submitting that the points he was raising were of outstanding importance. At my request he deferred full argument of the matter until such time as it was sought to take action upon these subpoenas in the shape of seeking to administer the oath to the witness or calling for documents.

It is convenient first to refer to the subpoena duces tecum. It was explained to me that S.S.A.F.A. is an association to which had been granted a charter of incorporation—and copies were, in due course, produced to me of its charter together with its rules, and its "duties of office bearers." Further, there was put before me, by consent of all concerned, the S.S.A.F.A. handbook of May, 1952, which details the work and administration of the Association, a pamphlet of January, 1953, entitled Welfare Notes for S.S.A.F.A. Overseas, and pp. 75 to 80 of the Manual of Pay Duties—which has a section entitled "Separation or "estrangement between the soldier and his wife."

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[8] [1942] A.C. 624.

[9] [1909] 1 K.B. 258; 25 T.L.R. 79.

[10] [1942] A.C. 624.

It being an integral part of the argument, as put forward to me, that S.S.A.F.A. is an independent body, and that neither the Association itself nor its staff are employees or agents of the Crown, it is convenient to state at the outset that the Association's independence is made clear by its charter. Its work is, of course, well known to be of magnificent assistance to members and ex-members of the Armed Forces of the Crown and their families; and at pp. 21–22 of the handbook there is to be found a list of some 20 or 30 examples of the work of the Association. Amongst these many examples figure "family welfare and "problems" and "service family problems." Other examples range from "apprenticeship fees" to "widows, grants to." In connexion with "family welfare and problems," S.S.A.F.A.'s function as regards matrimonial cases, with the special object of effecting reconciliations, is set out at p. 15 of the book.

With the aid of this background information, Mr. Rodger Winn referred to a certificate by the Secretary of State for War dated November 29, 1954 (the precise terms of which I will mention later), which stated, inter alia, that having read the correspondence and notes covered by the subpoena duces tecum addressed to him he was of opinion that it was not in the public interest that the documents should be produced. In support of the claim for privilege Mr. Winn referred me to the well-known authorities *Duncan* v. *Cammell Laird & Co. Ld.*,[1] *Ellis* v. *Home Office*[2] and *Ankin* v. *London and North Eastern Railway Co.*[3] In addition, he assisted me by reading considerable extracts from the argument of Mr. Comyns Carr K.C. and Sir Valentine Holmes K.C. respectively, before Lynskey J. in *Moss* v. *Chesham U. D. C.*,[4] together with the dicta of Lynskey J. in the course of those arguments.

The above decisions seem to make it clear that, where documents are concerned, the Crown privilege can attach irrespective of where a document originates or in whose custody it reposes —subject, however, to the points that all the decided cases relate to documents which have either emanated from or have come into the possession of some servant or agent of the Crown properly, and that where the Crown is in physical possession of a document that normally of itself results in the Crown being able to claim privilege. Although it was not made entirely clear how the documents came into the possession of the War Office, it has, of course, been assumed by me that they had not been lodged with the Secretary of State for War solely for the purpose of a claim for Crown privilege being made, and on that footing I accordingly ruled that Crown privilege attached them—and, indeed, Mr. Hollins, for the wife, did not in the upshot argue to the contrary.

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[1] [1942] A.C. 624.

[2] [1953] 2 Q.B. 135.

[3] [1930] 1 K.B. 527.

[4] (Unreported) January 16, 1945

Mr. Winn further argued that secondary evidence of the contents of the documents was not admissible on the ground that, where it is contrary to the public interest for the document to be produced, then the privilege applies to secondary evidence, whether that evidence consists of a copy of the document or of oral evidence as to its contents. That point, however, did not arise in the present case, as no such secondary evidence was tendered. The authorities, however, appeared to support Mr. Winn's argument in relation to documents sent in the normal course of communication by or to servants of the Crown or their agents; but I am not quite sure (in the absence of full information as to precisely how the Crown came to possess these particular documents) whether the rule as to secondary evidence would necessarily have applied here; the position where the Crown is a mere bailee may need further examination.

One further point I should make plain—that Mr. Winn disclaimed (as, indeed, he was clearly right in doing) any suggestion that a fact stated in a privileged document could not be put in evidence aliunde merely because it had been stated in a privileged document.

Then came the argument on the application to set aside the subpoena ad testificandum addressed to Mrs. Allsop. Mr. Winn adduced arguments of a very far reaching nature to support, first, the certificate of the Secretary of State for War, which was in the following terms: "I have read the correspondence and notes "covered by the subpoena issued to me dated November 12, 1954, "and I have considered the evidence which Mrs. Gwenneth Mary "Allsop could give, as set out in a statement taken from her and "submitted to the Treasury Solicitor by Messrs. Barton & "Hanning, and I am of opinion that it is not in the public interest "that the documents should be produced or the evidence of "Mrs. Allsop given orally," and, secondly, his argument that a correct method of attaining the object aimed at by the certificate was to have the subpoena set aside.

The substance of this argument was that Crown privilege attached not merely to documents, to secondary evidence as to the contents of those documents, and to evidence as to what occurred at any government instigated inquiries (other than public inquiries) that might have resulted in the compilation of the documents (e.g., if they happened to consist of reports), but also to any facts whatsoever—whether or not mentioned in documents to which Crown privilege attached. He submitted that a Minister of the Crown could give a certificate that the giving of evidence by any specified witness (whether or not a servant or agent of the Crown) as to any set of facts or class of facts would be contrary to the public interest, and that once that certificate was given those facts could not be given in evidence in court by the witness. Should it be an issue in a civil action, for instance, whether A stole money or goods from B, Mr. Winn submitted it would be competent for a Minister of the Crown to certify that it was contrary to the public interest for a witness who saw the theft to give evidence to that effect. According to Mr. Winn, the sole test whether the privilege attached was the opinion of a Minister that for the witness to give that piece of evidence was contrary to the public interest—an opinion into which he submitted the court could make no inquiry. What may be compendiously described as "privilege "by unexaminable certificate" was thus asserted to be all-embracing. That being Mr. Winn's submission as to the state of the law, he went on to submit that the correct procedure, when once the Minister of the Crown had given a certificate in the general form used in this case, was for the Crown then to apply for the subpoena addressed to the witness to be set aside.

As regards the law relating to the powers of the Crown to prevent any and every witness giving evidence of facts which that witness had seen, Mr. Winn stated that he was unable to produce any authority as to a court acting after full argument (or even without full argument) on such a broad claim by the Crown. He relied, however, on a dictum in the speech of Viscount Simon L.C. in *Duncan* v. *Cammell Laird & Co. Ld.*,[5] a case relating to the specification for and other documents held by agents of the Crown touching the construction of and the condition of a ship of war—the submarine *Thetis*. There it was stated[6]: "The

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[5] [1942] A.C. 624.

[6] Ibid. 643.

"present opinion is concerned only with the protection of documents, but it seems to me that the same principle must also "apply to the exclusion of oral evidence which, if given, would "jeopardize the interests of the community."

As regards the evidence of Mrs. Allsop, Mr. Winn stated that the desire of the Crown was to ensure that those works of S.S.A.F.A. which were concerned with maintaining good relations between husband and wife, and which often took the form of attempts to reconcile them after troubles had arisen, should be given the same sort of protection from disclosure in court as the efforts of probation officers and others who come within the Court of Appeal decisions of *McTaggart* v. *McTaggart* [7] and *Mole* v. *Mole*.[8] For the S.S.A.F.A. organization it was, however, desired by the Minister of War that the protection from its efforts being the subject of evidence should apply whether or not the parties desired such protection, or even if both parties desired that the evidence be given. Mr. Winn's point was that the privilege in cases like *Mole* v. *Mole* [8] could be waived by the parties, whereas the Minister of War desired that there should be no chance of such a waiver. The head of public interest put forward was that of the maintenance of the morale of the Armed Forces.

When, however, one had regard to the issues which were being contested in this particular case, it was obvious that the case had so developed that the evidence of Mrs. Allsop might well be relevant to points which had arisen before there was any occasion for reconciliation between the parties. Thus there were disputes both as to what accommodation could have been secured by the husband at the time his wife arrived in Hong Kong; as to whether the accommodation he in fact secured was or was not reasonable accommodation in the circumstances; and as to matters relating to general conditions in Hong Kong. Until questions were put to the witness it was obviously impossible to tell whether or not they came within that area of S.S.A.F.A. activities for which the Minister of War was stated to desire protection. An application to set aside the subpoena would, if granted, have prevented the witness even being sworn, and would certainly have prevented her having given evidence on any fact, whether or not it was one against the public interest to disclose. Further, any certificate in a "blanket form" which stopped a witness going into the witness-box seems contrary in principle to those portions of the decided cases which enjoin Ministers before giving a certificate as regards documents to examine each in turn in the light of the issues arising in the case.

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[7] [1949] P. 94; 64 T.L.R. 558; [1948] 2 All E.R. 754.

[8] [1951] P. 21.

In those circumstances it seemed to me that even if it was within the competence of a Minister of the Crown to prevent a witness giving evidence on some set of facts or class of facts, it was surely wrong to adopt a procedure which would prevent the witness giving any evidence whatsoever of any sort. Certainly nothing in *Rex* v. *Baines*[9] assisted Mr. Winn, as the present subpoena did not refer to a witness who could give no relevant evidence, nor was the subpoena oppressive in any way. Accordingly, I ruled that the application to set aside the subpoena failed.

Mr. Winn then suggested that it might be left open to him to listen to each question in turn and take on that question such objection as might seem right. In that behalf he relied upon a suggestion made by Jenkins L.J. in *Ellis* v. *Home Office.*[10] That suggestion, however, relates to the waiver of privilege after that privilege has been established. In the present case the form of the certificate was not such as to enable the court to ascertain from its own wording what really was the nature of the evidence for which privilege was being claimed, and I declined to allow Mr. Winn to adopt that course unless he obtained some further certificate on which I could consider better whether the privilege arose and what it attached to. I offered him an adjournment for that purpose, or in case he wished to test my ruling on the subpoena by going to the Court of Appeal—but in all the circumstances he preferred not to be granted such an adjournment for either purpose. The result was that he ceased to have a locus standi in the case, but helpfully volunteered to and did remain as amicus curiae.

As the claim to Crown privilege thus failed on an issue of procedure, it is not necessary for me to decide whether the privilege exists, as claimed, or what is the correct procedure for claiming it. But the point having been developed in lucid and cogent argument on behalf of the Crown it seems right to say that, at the stage when my ruling was given, I had not as yet been persuaded of the existence of the privilege in the terms in which it was submitted to me.

No case having been found in the reports of such privilege having been thus successfully asserted by the Crown, and no textbook vouching for its existence having been cited, I feel that any court would consider carefully before conceding to the Crown

[9] [1909] 1 K.B. 258.

[10] [1953] 2 Q.B. 135.

what would be, in effect, a general power wholly to suppress evidence from every source of facts merely upon the unexaminable opinion of a Minister as to what that Minister regarded as the public interest. Whatever may be the position in other countries, it would seem that this country has progressed for some considerable period without such a wide power having been thus asserted.

In relation to this case the claim involved the extension or development of Crown privilege in three separate directions—as to the all-embracing nature of the evidence privileged (for previous claims in this form have related only to documents), as to the persons affected (the claim referred to all witnesses, as opposed to classes of witnesses) and as to the heads of public interest, the head here asserted being the maintenance of the morale of the Forces.

Before the claim of the Crown to such wide privilege was held to be valid in law, my inclination would have been to call for argument on certain further points. First, whether the development of Crown privilege on the grounds of public interest might not now be regarded by the courts in the same light as the development of new heads of public policy invalidating contracts, and new heads of criminal charges against individuals of acting to the public mischief; the tendency, in each of these matters, being for the courts not to develop fresh heads but to leave them to the legislature. Secondly, if development is to take place, whether it might not be circumscribed by reference to certain specific heads of public interest, such as the safety of the realm, international relations, or the prevention and detection of crime. (One cannot help noting that the steps which would extend the heads of public interest from " maintaining the morale of the Forces " to " maintaining general public morale " and thence to " maintaining the faith of the public in specific institutions serving it " are neither very large nor unduly illogical.) Thirdly, whether the present method for claiming privilege in relation to specific documents is necessarily apt for claiming privilege in relation to a witness being asked in the box to answer questions, the precise form of which cannot be ascertained until counsel has put those questions in the light of the course the case takes at the trial. Whilst the courts have never been slow to prevent improper disclosure of matters truly injurious to the vital interests of the realm, I doubt whether it can rightly be said that they, in the past, have found themselves unable, or are now unable, to prevent such improper disclosure of matters (at any rate in relation to matters reasonably circumscribed as indicated above) without

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the Crown being held to have so wide an area of privilege by unexaminable certificate as it now seeks to assert.

It is of obvious importance to ensure generally that claims of Crown privilege are not used unnecessarily to the detriment of the vital need of the courts to have the truth put before them. How easily it can be sought—albeit in the utmost good faith—to make such a claim unnecessarily is well illustrated by the facts of the present case. When Mrs. Allsop was called she spoke as to the way in which the wife was received at the quay at Hong Kong, as to the sort of accommodation which was available for wives, as to the suitability of certain accommodation which the husband had secured, and as to the wife having a certain disability which made it the harder for her to bear intensely hot weather. On all those points her evidence was of assistance to the court; on none of them was there any apparent cause for any intervention in the name of Crown privilege.

When the witness's evidence began to verge on later matters, which had been her concern in her capacity as conciliator, it was easy to ensure that the principles laid down in *Mole* v. *Mole*[11] were applied. Indeed, Mr. Winn in the upshot appeared readily to concede that nothing had happened which really called for intervention by the Crown, even if the privilege existed.

The effect of the evidence which thus became available was as follows: that the husband and wife upon their meeting on the quay were in tears of joy, and there is no truth that there was anything unfriendly in the reception of the wife on the part of the husband. Next that the wife was taken to accommodation which had been approved as suitable by the Commanding Officer—although the accommodation to which she was taken was not Lytton House, to which most of the other wives on the transport had gone. Lytton House, it so happened, had been one of the places where the husband tried to get accommodation, but he had been told that it was full.

[His Lordship then considered the remainder of the evidence and held upon the facts that the charge of cruelty had not been made out and granted the husband a decree upon the prayer of his amended answer.]

Rule accordingly.

Solicitors: *Barton & Hanning; Rowley Ashworth & Co. for Nash, Howett, Cocks & Clapp, Plymouth; Treasury Solicitors.*

J. B. G.

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[11] [1951] P. 21.

1955
Feb. 14, 15,
16, 17.

Sachs J.

HENLEY *v.* HENLEY (BLIGH CITED).

Husband and Wife—Divorce—Evidence—Privilege—Statements of party to self-appointed conciliator.
Evidence—Privilege.

The principle that privilege attaches to the evidence of persons acting as conciliators in matrimonial disputes applies not only when one of the parties has taken the initiative and sought out the conciliator but also when the conciliator has approached and been accepted by one of the parties as a conciliator.

McTaggart v. *McTaggart* [1949] P. 94; 64 T.L.R. 558; [1948] 2 All E.R. 754; *Mole* v. *Mole* [1951] P. 21; 66 T.L.R. (Pt. 2) 129; [1950] 2 All E.R. 328 applied.

DEFENDED PETITION for divorce.

The parties were married in 1941. On February 3, 1954, the wife left the matrimonial home and on February 11, 1954, she filed a petition seeking the dissolution of the marriage on the ground of her husband's adultery. The husband, by his answer, denied adultery and in turn alleged that the wife had committed adultery from the year 1948 onwards with one, John Bligh.

The fact that difficulties had arisen in the married life of the parties for some time before the wife's leaving home was stated to be a matter of common knowledge in Benenden, the village in which they lived. The vicar of Benenden heard of their difficulties and on his own initiative went to see the husband as a conciliator and was accepted in that role. He then went to the wife, making it clear to her that he had come as a conciliator; and on that basis a conversation took place between the vicar and the wife. This occurred at about the time when the wife left home and filed her petition. No reconciliation was, however, effected and the suit came on for hearing on February 14, 1955.

In the course of the husband's case his counsel sought to call the vicar of Benenden as a witness to give evidence of the conversation which had passed between the vicar and the wife. Counsel for the wife objected on the ground that the vicar was a conciliator to whose evidence privilege attached. The vicar was called and gave evidence solely as to the circumstances in which the conversation was held.

Cecil Binney for the wife and party cited. The evidence of the vicar of Benenden is objected to on the ground that he acted as a conciliator between the parties. The principle on which such evidence is privileged is that were it otherwise negotiations for a settlement between parties would be rendered impossible, and this principle was established in *La Roche* v. *Armstrong*[1] long before it was applied to matrimonial disputes in *Pool* v. *Pool*[2] and *McTaggart* v. *McTaggart*.[3] In *Mole* v. *Mole*[4] Denning L.J. did not accept that *Bostock* v. *Bostock*[5] was rightly decided and stated obiter that the principle in *McTaggart* v. *McTaggart*[6] applied to doctors and clergymen as well as to probation officers. In that case both parties had accepted the probation officer as a conciliator; but it is submitted that the principle logically extends to the facts of the present case.

Roger Ormrod for the husband. Whether evidence is privileged or not depends upon whether in the circumstances of the case the parties intended their conversations and negotiations to be without prejudice: *Bostock* v. *Bostock*.[7] Neither party called upon the vicar to act as a conciliator: he did so on his own initiative, and there were no negotiations; the purpose was merely to explore a possibility. It is conceded that the evidence of conciliators sought out by both parties is now privileged, but this doctrine is an invasion of common law rights and as such should not be extended.

SACHS J., considering the question of privilege, said: I start with the proposition, stated in *Mole* v. *Mole*,[1] that one must bear in mind that in a matrimonial dispute the State is also an interested party and is more interested in reconciliation than in divorce. It was with that consideration in mind that the Court of Appeal have laid down that in certain circumstances intermediaries and conciliators are persons to whose evidence privilege attaches, and have referred to the fact that if privilege did not attach, those whom the conciliators sought to reconcile would tend not to be frank with them—which of itself would be an impediment to reconciliation.

The position here is that the vicar of Benenden who, by virtue of his office, is a person who can be trusted by his parishioners to have the highest motives in seeking to effect a reconciliation and to be a person to whom, of all people, they can best allow themselves to be frank, very properly took certain steps when the estrangement between this husband and this wife came to his notice. He went to the husband as a conciliator and as a conciliator he was accepted by the husband. Thus accepted, he went to the wife as a conciliator, making it clear to her that he was a conciliator; and upon her realizing that, a conversation took place.

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[1] [1922] 1 K.B. 485; 38 T.L.R. 347.

[2] [1951] P. 470; [1951] 2 T.L.R. 662; [1951] 2 All E.R. 563.

[3] [1949] P. 94; 64 T.L.R. 558; [1948] 2 All E.R. 754.

[4] [1951] P. 21; 66 T.L.R. (Pt. 2) 129; [1950] 2 All E.R. 328.

[5] [1950] P. 154; 66 T.L.R. (Pt. 2) 339; [1950] 1 All E.R. 25.

[6] [1949] P. 94.

[7] [1950] P. 154.

[1] [1951] P. 21, 23.

It is urged by Mr. Ormrod that the authorities *McTaggart* v. *McTaggart*[2] and *Mole* v. *Mole*[3] apply only when one of the two parties has taken the initiative and sought out the conciliator, and do not apply when one of the parties has been approached by and accepts the person concerned as a conciliator. If that submission be right it would produce a sad result as regards the interests of the State, because frankness towards an accepted intermediary would be deprived of the privilege which in my view it should have. I do not accept the argument that for privilege to attach the initiative must have come from one of the parties and that one can exclude cases where the conciliator, from a knowledge of the circumstances, thinks it wise and proper in the interests of the parties, and thus in the interests of the State, to make the approach.

In this case I see no distinction between the position of the vicar if he had been asked by the husband to go to the wife, or if in fact he went to the husband first and was accepted by him as a conciliator and then went on to the wife. In those circumstances I hold that the conversation is privileged.

Rule accordingly.

[After hearing the evidence his Lordship granted a decree nisi on the prayer of the petition and dismissed the cross-prayer of the answer.]

Solicitors: *Hancock & Scott; Kenneth Brown, Baker, Baker for Murton, Clarke & Murton-Neale, Cranbrook.*

E. J.

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[2] [1949] P. 94.

[3] [1951] P. 21.

In re LAPFORD (DEVON) PARISH CHURCH.

1954
Sept. 30;
Nov. 2.

Court of Arches, Canterbury. Sir Philip Wilbraham Baker Wilbraham, Dean of Arches.

Ecclesiastical Law—Faculty—Tabernacle—Reservation of Sacrament for the sick—Use of simple tabernacle as receptacle—Proposal to place above altar of Lady Chapel—Whether illegal—Limited power of chancellor to grant faculty.

A faculty was sought to instal in the chapel of the parish church a "tabernacle" to serve as a receptacle for the reservation of the Blessed Sacrament for the sick, and certain other working persons, to take the place of an unsuitable "aumbry":—

Held, (1) that although the reservation of the Blessed Sacrament for any purpose is, strictly speaking, illegal, reservation for the communion of the sick may be practised blamelessly and rightly where the conditions provided for by the Alternative Order for the Communion of the Sick are complied with.

(2) That where the bishop has sanctioned reservation, a diocesan chancellor may grant a faculty for an aumbry, but not for a tabernacle or pyx to be placed immediately behind or above a holy table. In the present case (affirming the decision of the chancellor) the grant of a faculty for a tabernacle was, therefore, refused.

Capel St. Mary, Suffolk v. *Packard* [1927] P. 289 and *Oxford* (*Bishop*) v. *Henly* [1907] P. 88; 23 T.L.R. 152 considered.

Decision of W. S. Wigglesworth Ch. [1954] P. 416 affirmed.

APPEAL from W. S. Wigglesworth Ch., delivered on April 12, 1954, at Exeter, refusing the grant of a faculty to place a tabernacle in the parish church of Lapford, Devon. The petition was by the rector and two churchwardens and supported by unanimous resolution passed by the parochial council and was not opposed.

The facts appear fully in the judgment of Sir Philip Wilbraham Baker Wilbraham, Dean of Arches.

Wigglesworth Ch. held that so far as the authorities were applicable to the use of a tabernacle as a receptacle for reservation, a tabernacle, as an article different in character from an aumbry, was an illegal church ornament and its use was unlawful.

Sir Andrew Clark Q.C. and *E. Garth Moore* for the petitioners.

The following cases were cited in argument *: *Capel St. Mary, Suffolk (Rector and Churchwardens)* v. *Packard* [1]; *Roffe-Silvester*

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* The argument in this court cannot be more fully reported owing to the death of the reporter.

[1] [1927] P. 289.

v. *King* [2]; *Read* v. *Bishop of Lincoln* [3]; *St. Mary the Virgin, Swanley* [4]; *Altofts* case [5]; *West Ilsley.* [6]

Cur. adv. vult.

1954. Nov. 2. Sir Philip Wilbraham Baker Wilbraham, Dean of Arches, read the following judgment:

This is an appeal from an order of the Chancellor of the Consistory Court of Exeter (Mr. W. S. Wigglesworth) refusing to grant a faculty for a tabernacle.

The facts are not in dispute, and I take them from the judgment of the chancellor.[1] On November 12, 1953, the rector and churchwardens of the parish of Lapford in the diocese of Exeter presented a petition praying for a faculty authorizing them to place above the centre of the altar in the Lady Chapel of their parish church a simple tabernacle for the reservation of the Blessed Sacrament for the sick, in accordance with plans prepared by Mr. Herbert Read of Exeter. The petition was supported by a unanimous resolution passed by the parochial church council on November 9, 1953. Citation was issued on November 17, 1953, and no one entered an appearance in opposition to the citation. Although the petition was unopposed it was heard in court, as the chancellor was not satisfied that a tabernacle could lawfully be introduced into a church and therefore wished to hear argument on the matter.

The circumstances which led to the application were explained by the rector, who gave evidence in support of the petition. The rector was appointed in November, 1952, and on his arrival he found that the Blessed Sacrament was reserved in an aumbry resting on a window-sill in the wall on the north side of the principal altar. The aumbry had been placed there some 15 years earlier during the incumbency of the Reverend W. F. Bond who, so far as it could be ascertained, had sought and obtained permission to reserve from the late Bishop Curzon, then Bishop of Exeter, and for that purpose to place the aumbry on the sill. No faculty was on that occasion sought from the consistory court. On the arrival of the present rector he was authorized by the present bishop to continue the practice of reserving the Blessed Sacrament in the aumbry, and he has done so. In this particular parish the reserved Sacrament is also desired for the communion

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[2] [1939] P. 64; 55 T.L.R. 33; [1938] 4 All E.R. 147.

[3] [1892] A.C. 644; 8 T.L.R. 763.

[4] (1946) Unreported.

[5] (1941) Unreported.

[6] (1952) Unreported.

[1] [1954] P. 416.

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of certain workers in a factory who are unable to make their communion in church on Sunday or weekday mornings and who (with the bishop's sanction) make their communion from the reserved Sacrament in the Lady Chapel after Evensong on those Sundays when there is no celebration of the Holy Communion in the evening. The petition was amended at the hearing so as to make it clear that the reserved Sacrament was not intended to be used only for the sick, but was also to be used for those workers who could not attend the ordinary celebrations of the Holy Communion.

The rector found that the aumbry was neither safe (since it has no lock) nor conveniently placed, and shortly after his arrival began to consider ways and means for making other provision for the safe custody of the reserved Sacrament. He considered that a tabernacle would be better, and was able to ensure that the necessary money for the change would be available, the tabernacle itself being the subject-matter of a gift. He then sought the bishop's directions in the matter, and received a letter from the bishop dated December 31, 1952, which, so far as material, was as follows: "I am glad to hear that you have been able to get "a grant towards the cost of a simple tabernacle for the reserva-"tion of the Blessed Sacrament at Lapford, and I am content "to leave it to you to decide—when applying for a faculty—"whether this shall be placed on the High Altar or in the Lady "Chapel."

Supported by this letter from the bishop, the rector with his churchwardens in the first instance presented a petition for a faculty to authorize the placing of a tabernacle on the High Altar. This proposal was considered by the Exeter Diocesan Advisory Committee, who advised against it on architectural and aesthetic grounds, adding to their report: "It would be better either to "use an aumbry in the north wall or to place the tabernacle above "the altar of the Lady Chapel in accordance with the alternative "suggestion of the bishop." It was because of this advice that the present proposal for a tabernacle on the altar in the Lady Chapel was made. Mr. Read, who described himself as a sculptor and designer, explained in the evidence he gave that it was not in fact proposed that the tabernacle should be placed on the altar, but that it should be bolted to the wall behind so that it would protrude over the back of the central part of the altar allowing a slight clearance between the bottom of the tabernacle and the top of the altar to facilitate the placing and changing of altar cloths. The Lady Chapel is so constructed that nowhere in its walls could an aumbry be conveniently placed. The north side is occupied by the door into the vestry leaving only a strip of wall four feet wide to the east of the door and the east wall is largely occupied by the altar and its surrounding curtains. There is no south wall.

The petition came on for hearing on January 2, 1954, in the Chapter House at Exeter. Mr. Garth Moore appeared for the petitioners and the petition was unopposed. After hearing argument the chancellor delivered his reserved judgment on March 12, 1954. By that judgment he held (1) that the reservation of the Blessed Sacrament in the circumstances of this particular case with the sanction of the bishop was legal; (2) that if the matter had been free from authority he would have had no hesitation in granting the faculty, but (3) that he felt constrained by authority binding on him to hold that the tabernacle was an illegal ornament.

The principal authority referred to was the decision of Sir Lewis Dibdin in *Capel St. Mary, Suffolk* v. *Packard*,[2] who held that a tabernacle was "an illegal ornament used in connexion "with an illegal ceremony."[3] Sitting in this court I am perhaps less strictly bound. The question of reopening previous decisions of ecclesiastical courts was discussed in *Read* v. *Bishop of Lincoln*[4]; but although some latitude may be allowable, it would need strong reason to justify me in departing from Sir Lewis Dibdin's decision in the *Capel St. Mary* case.[5]

When the case came before me on appeal, on September 30, 1954, the argument turned mainly upon the question of whether a tabernacle was a legal ornament having regard to the words of the ornaments rubric, as follows: "And here it is to be noted, "that such ornaments of the Church and of the ministers thereof, "at all times of their ministration shall be retained, and be in "use, as were in this Church of England, by the authority of "Parliament, in the second year of the reign of King Edward "VI." Reference had been made in the court below to the opinion held by the late Dr. Eeles that a hanging pyx over the high altar was the lawful ornament under the rubric, as it was the ornament in use for the purpose of reservation at that time. In *St. Mary the Virgin, Swanley*,[6] heard by Ashworth Ch. at Rochester, evidence to the same effect was given by Dr. Jalland, a lecturer in theology in the University College of South West Exeter, who said that he would not expect to find evidence that tabernacles were ornaments of the Church in 1549 because the normal method of reservation in this country was by means of a hanging pyx.

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[2] [1927] P. 289.

[3] Ibid. 305.

[4] [1892] A.C. 644, 654, 655; 8 T.L.R. 763.

[5] [1927] P. 289.

[6] (1946) Unreported.

The arguments of the petitioners in favour of the tabernacle were ably presented and took many forms. It was urged that a tabernacle was not an ornament at all, but merely a receptacle like an aumbry, and therefore outside the rubric. If it was an ornament, it was an ornament expressly authorized by the rubric, because it was merely a variant of the pyx, which was certainly in use in 1549. There was nothing in the rubric which expressly forbade a tabernacle. It could not be supposed that the rubric fixed the permissible ornaments for all time; new ornaments might be introduced. If a tabernacle was neither authorized nor forbidden by the rubric, its introduction became a matter for the discretion of the bishop under his jus liturgicam. It was even suggested that Parliament had recently reaffirmed the legality of the pyx and of reservation, because the Statute Law Revision Act, 1948, while repealing section 3 of the Act 1 Mary, sess. 2 of 1553, c. 3, had left unrepealed section 1 of that Act which, inter alia, prescribed penalties for " abusing the Sacrament of the Altar " . . . or the pyx or canopy wherein the same Sacrament is or " shall be."

After listening to these arguments, and refreshing my memory by reference to the shorthand note, I can see no sufficient reason for departing from the opinion expressed in the *Capel St. Mary* case [7] that a tabernacle is an illegal ornament. I do not want, however, to base my judgment in this case on the foundation of the ornaments rubric alone; I would rather refer to more recent history.

But first as regards reservation. Comparatively little was said in argument about its legality, the petitioners being naturally content to rely on the opinion expressed by the chancellor in the court below [8]: " I am glad to feel able to hold the view that " reservation with the sanction of the bishop is not unlawful." I think this statement of the law requires some qualification.

In the course of his judgment the chancellor said [9]: " I know " of no authority which compels me to hold that reservation is " unlawful when it takes place with the sanction of the bishop. " I do not consider that it is forbidden by article 28 or by the

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[7] [1927] P. 289.

[8] [1954] P. 416, 425.

[9] Ibid. 424.

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"rubric at the end of the Communion service which was inserted "for a wholly different reason, namely, for the prevention of the "irreverent practices of Puritans. In my view, the Prayer Book "neither forbids nor authorizes reservation; it makes no provision "for it. Where the bishop considers that something not provided "for is needed, it is for the bishop to make provision in the "exercise of that authority which he has in his diocese. Where "he considers reservation to be needed, it is for him to sanction "it, and where he sanctions it, this court can and should by "faculty authorize such alterations or additions in the church as "are necessary to secure that due provision is made for reservation." I cannot accept this view of the complete neutrality of the Prayer Book. The relevant words of article 28 are: "The "Sacrament of the Lord's Supper was not by Christ's ordinance "reserved, carried about, lifted up, or worshipped."

If this article stood alone, there might perhaps be room for doubt. It might be argued that reservation is not forbidden either expressly or by necessary implication. The true construction of the article was discussed by Sir Lewis Dibdin in *Oxford* (*Bishop*) v. *Henly*,[10] and I am inclined to follow his opinion that the most natural construction of the 25th and 28th articles is that the practices therein mentioned are repudiated by the Church of England because they do not satisfy the condition of being according to Christ's ordinance. However this may be, the words of the rubric at the end of the Communion service are clear: "If "any remain of that which was consecrated it shall not be carried "out of the church but the priest and such other of the communicants as he shall call unto him shall, immediately after "the Blessing, reverently eat and drink the same." Whatever may have been the reasons for the insertion of these words, I think that I am bound to take them as they stand, and they are inconsistent with any form of reservation. This view, at any rate, has the support of authority. In *Sheppard* v. *Bennett*[11] we find the Lord Chancellor saying that reservation is illegal. This was only a dictum, but it is a dictum of high authority, and the Lord Chancellor refers to the illegality of reservation as if it were a well-known fact, too plain to need any argument[12]: "Such an act could not be done except in the service, because "the Sacrament may not be 'reserved.'"

In 1899 and 1900 the question of reservation was fully considered by Archbishop Frederick Temple of Canterbury and Archbishop Maclagan of York, and in May, 1900, Archbishop Temple delivered the following opinion: "In conclusion after "weighing carefully all that has been put before us, I am obliged "to decide that the Church of England does not at present allow "reservation in any form, and that those who think it ought to "be allowed, though perfectly justified in endeavouring to get the "proper authorities to alter the law, are not justified in practising "reservation until the law has been altered."

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[10] [1907] P. 88, 98, 99; 23 T.L.R. 152.

[11] (1870) L.R. 4 P.C. 350, 414.

[12] Ibid.

The practice of reservation was held to be illegal by Sir Lewis Dibdin in *Oxford (Bishop)* v. *Henly*,[13] and by the same judge in the *Capel St. Mary* case.[14] So far the question of reservation by permission of the bishop had not come into prominence. But although the bishop has no doubt a large discretion in matters which are doubtful, or not fully provided for by the rubrics, it does not enable him to legalize anything which is plainly illegal. Incidentally I should mention that an instance of the exercise of this discretion occurs in this case where the bishop has sanctioned the use of the reserved Sacrament for the benefit of certain workers who by reason of their employment are unable to attend the ordinary services of Holy Communion. Clearly, any such extension should be carefully watched, but I regard it as a matter within the bishop's discretion.

It is curious, to my mind, that throughout these proceedings so little reference was made to the work of the Prayer Book revision, which occupied so much of the attention of the Church during the years 1922–28. Many controversial questions arose in the course of that revision, but none more controversial or more crucial than this question of reservation. The revisers were anxious to legalize reservation for a strictly limited purpose—the communion of the sick. For that purpose they thought it necessary to alter the rubric at the end of the Communion service so as to read as follows: "If any of the consecrated bread and "wine remain, apart from that which may be reserved for the "Communion of the Sick, as is provided in the Alternative Order "for the Communion of the Sick it shall not be carried out of the "church, etc." If reservation had been legal, or if the revisers of the Prayer Book had thought it to be so, this exception would have been unnecessary; much of the work and controversy involved in the revision might have been spared; and the ultimate result in Parliament might have been different.

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[13] [1907] P. 88.

[14] [1927] P. 289.

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The rubrics preceding the Alternative Order for the Communion of the Sick in the 1928 Book prescribed with minute care the conditions under which reservation might be sanctioned. The first deals with the practice of "extended Communion," when the consecrated bread and wine are taken at once, or at any rate on the same day, to the sick person or persons. The second provides for continuous reservation in cases where the bishop thinks it necessary; this requires a licence from the bishop. The third and fourth rubrics are as follows:

"The consecrated bread and wine set apart under either of "the two preceding rubrics shall be reserved only for the Com- "munion of the sick, shall be administered in both kinds, and "shall be used for no other purpose whatever. There shall be "no service or ceremony in connexion with the Sacrament so "reserved, nor shall it be exposed or removed except in order to "be received in Communion, or otherwise reverently consumed.

"The consecrated bread and wine thus set apart shall be "reserved in any aumbry or safe. The aumbry shall (according "as the bishop shall direct) be set in the north or south wall of "the Sanctuary of the church or of any chapel thereof, or, if "need be, in the wall of some other part of the church approved "by the bishop, provided that it shall not be immediately behind "or above a holy table. The door of the aumbry shall be kept "locked, and opened only when it is necessary to move or replace "the consecrated elements for the purposes of Communion or "renewal. The consecrated bread and wine shall be renewed at "least once a week." In this last rubric a clear distinction is drawn between an aumbry on the one hand, and a tabernacle or pyx on the other hand. Though neither the word "tabernacle" nor "pyx" is to be found in the rubric, the aumbry is not to be "immediately behind or above a holy table," which is the place where a tabernacle or pyx would be. The reason for the distinction is not far to seek; reservation was to be authorized for the purpose of Communion only, and for this purpose an aumbry set in a side wall would be a proper and sufficient provision.

Such would have been the law if the Prayer Book measure of 1928 had been accepted by Parliament. Its rejection left the bishops in a difficult position. All the deviations and additions contained in the 1928 Book remained, strictly speaking, illegal, including the provisions as to reservation for the sick. But the law as it stood was evidently too rigid; and (under the Church Discipline Act, 1840, and the Public Worship Regulation Act, 1874) the power of enforcing compliance with the law rested with

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the bishops, or rather with each bishop in his own diocese. How could the bishops discipline their clergy or allow them to be prosecuted in respect of practices which they themselves—to say nothing of the clergy and laity—had so recently sanctioned by large majorities in the convocations and the church assembly?

Some common policy was obviously necessary. The bishops consulted their dioceses, and when the Convocation of Canterbury met in July, 1929, resolved that in the exercise of their administrative discretion they would in their respective dioceses consider the circumstances and needs of the parishes severally, and give counsel and directions. In these directions the bishops would conform to the principles which they had already laid down, namely: "(1) That during the present emergency and until "further order be taken the bishops, having in view the fact that "the Convocations of Canterbury and York gave their consent to "the proposals for deviations from and additions to the Book of "1662, as set forth in the Book of 1928, being laid before the "National Assembly of the Church of England for final approval, "and that the National Assembly voted final approval to these "proposals, cannot regard as inconsistent with loyalty to the "principles of the Church of England the use of such additions "or deviations as fall within the limits of these proposals. For "the same reason they must regard as inconsistent with such "loyalty the use of any other deviations from or additions to the "forms and orders contained in the Book of 1662. (2) That "accordingly the bishops, in the exercise of their legal or administrative discretion, will be guided by the proposals set forth in "the Book of 1928, and will endeavour to secure that the practices "which are consistent neither with the Book of 1662 nor with "the Book of 1928 shall cease." This resolution received the support of the clergy, and I understand that a similar resolution was passed in the Convocation of York. It will be noted that these resolutions were provisional—"until further order be "taken." But so far as I am aware no further order has been taken with regard to reservation.

Of course these resolutions could not alter the law in any respect. But they did constitute a claim by the Church to do a number of illegal things within certain limits, coupled with an obligation to endeavour not to transgress those limits. The obligation could not be absolute; none knew better than the bishops the impossibility of securing absolute uniformity. But it is an obligation which should be honoured as far as possible. An aumbry set in a side wall of a church is clearly within the

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limits which the Church has claimed to authorize. A tabernacle or pyx "immediately behind or above a holy table" is clearly outside those limits.

In a lesser degree, the rejection of the Prayer Book measures caused a difficulty for diocesan chancellors. They would be asked to decree faculties for the installation of aumbries. Could they rightly do so in connexion with a practice which they knew or believed to be unlawful? In the course of time, this question appears to have been answered in accordance with common sense. The duty of a diocesan chancellor in this matter is ancillary. He is not responsible for the reservation; but if he finds that reservation is in fact practised with the sanction of the bishop in a church within his jurisdiction, it is his duty to see that the provision made for keeping the consecrated bread and wine is both safe and seemly. This is well expressed in a judgment of Vaisey Ch. in the *Altofts* case,[15] quoted in the judgment in the court below.

My general conclusions, therefore, are: (1) That reservation of the Blessed Sacrament for any purpose is still, strictly speaking, illegal; (2) that nevertheless reservation for the communion of the sick may be practised, not only with impunity but (from every point of view except that of strict law) blamelessly and rightly, provided that the conditions laid down in the Alternative Order for the Communion of the Sick are complied with; and (3) that where the bishop has sanctioned the reservation a diocesan chancellor is justified in granting a faculty for an aumbry, but not for a tabernacle or pyx immediately behind or above a holy table.

In the present case, the parish of Lapford has had for over 15 years provision for reservation for the communion of the sick; and if the aumbry in which the sacred elements are now reserved is unworthy or unsafe, the chancellor has offered to consider an application for "alternative proposals not involving a tabernacle." I do not think that the petitioners are entitled to ask for anything more, and the appeal must be dismissed.

Appeal dismissed; faculty refused.

Solicitors: *Trollope & Winckworth.*

H. G.

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[15] (1941) Unreported.

J.—P. C. *v.* J.—A. F.

1955
Mar. 18.

Sachs J.

C. A.

1955
May 11, 12, 13, 16.

Evershed M.R., Hodson and Parker L.JJ.

Husband and Wife—Maintenance—High Court—"Ability"—Ability to overdraw or otherwise obtain loans—Conduct of the parties—Delay in filing discretion statement—Practice—Proper compliance with orders for discovery—Notice of allegations against opposite party—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 19.

"Ability" to provide maintenance, within the meaning of section 19 of the Matrimonial Causes Act, 1950,[1] should be broadly construed in the light of the realities of each case, and such "ability" may include an ability to provide money by overdrafts or through loans. Men who with such ability earn capital gains may live more than comfortably without being possessed of salary, of dividends, or of assets readily realizable for sums in excess of their overdrafts; and the reality of their position should be considered in assessing the amount of maintenance to be paid by them.

N. v. *N.* (1928) 44 T.L.R. 324; *Chichester* v. *Chichester* [1936] P. 129; *Klucinski* v. *Klucinski* [1953] 1 W.L.R. 522; [1953] 1 All E.R. 683 applied. *Howard* v. *Howard* [1945] P. 1; 61 T.L.R. 189; [1945] 1 All E.R. 91 considered.

A business man, whose wife had divorced him for adultery, had been making capital gains with the aid of his ability to obtain overdrafts, his interests being in property and building projects; and, although according to his tax returns his taxable income during the previous three years had remained under £70, the evidence showed that he had been living at least at the rate of £1,100 a year net with the use of a car in addition.

The wife filed her petition for divorce in October, 1949, but took no further step until in December, 1952, she obtained leave to amend her petition by asking for discretion in respect of adultery in 1949. An answer was filed in February, 1953; and in June, 1953, the wife by way of amendment to her petition, and of supplemental petition, alleged cruelty and made further charges of adultery with the woman named. The cruelty charges were closely linked with the allegations of adultery. The answer was later withdrawn, and in December, 1953, the wife was granted a decree on the ground of adultery. She did not in the circumstances press her cruelty charges.

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[1] Matrimonial Causes Act, 1950, s. 19: "(2) On any decree for divorce " . . . , the court may, if it thinks " fit, order that the husband shall, to " the satisfaction of the court, secure " to the wife such gross sum of money " or annual sum of money for any " term, not exceeding her life, as, " having regard to her fortune, if " any, to the ability of her husband " and to the conduct of the parties, " the court may deem to be reason- " able; . . .

"(3) On any decree for divorce . . ., " the court may, if it thinks fit, " by order direct the husband to pay " to the wife, during their joint lives, " such monthly or weekly sum for the " maintenance and support of the wife " as the court may think reasonable, " and any such order may either be " in addition to or be instead of an " order made under the last foregoing " subsection."

Upon the subsequent issue of maintenance the husband failed properly to comply with an order for discovery but was allowed to give evidence in chief at length and to refer to fresh financial matters at an oral examination before the registrar, against whose interim order both parties appealed.

Sachs J. *held*, (1) that, having regard to the husband's ability to provide money by overdrafts and loans, and to the standard at which he was living, he should be ordered to pay maintenance at the rate of £5 10s. a week free of tax upon an interim order.

(2) That a mere delay in filing a discretion statement was not relevant as between the parties in assessing the amount of maintenance.

(3) That the fact that the wife in the present case did not proceed with the charges of cruelty should not be held against her. If an alleged lack of sincerity did not affect the grant of a decree, it was doubtful whether it would affect the question of maintenance.

(4) That the wife was not in the circumstances under an obligation to go out and earn a living, and if she did, the husband was not entitled to have the whole amount of her earnings taken into account, although some "discount" might be made.

Ward v. *Ward* [1948] P. 62; 63 T.L.R. 647; [1947] 2 All E.R. 713; *Rose* v. *Rose* [1951] P. 29; 66 T.L.R. (Pt. 2) 440; [1950] 2 All E.R. 311 applied.

Per curiam. The obligation of the husband in maintenance proceedings is to be full, frank and clear in his disclosure of his means to the court, and any shortcomings in this respect can and normally should be visited at least by the court drawing inferences against him on matters the subject of shortcomings. He should, if possible, be forced before any cross-examination as to means to comply properly with orders for discovery, and not be allowed to give evidence in chief, and in cross-examination, without such prior compliance.

Where a husband seeks at the hearing of a maintenance application to allege that his wife has been guilty of conduct which the court should take into account, it is highly desirable that any charges which it is intended to make should first be reduced to writing in a form which will enable them to be properly met and enable any appellate court to know precisely what the charges were.

On appeal by the husband:—

Held, by the Court of Appeal, (1) that there had been no failure on the part of the judge to give proper consideration to the matters referred to in section 19 [1] of the Matrimonial Causes Act, 1950, and that in this case, where a husband by means of bank loans was enabled to maintain a consistent standard of living over a substantial period, that standard was a proper and indeed the only guide to be followed by the court in making provision for the maintenance of his former wife.

Observations of Lord Merrivale P. in *N.* v. *N.* (1928) 44 T.L.R. 324, 327 applied.

(2) That the effect of the order to pay £5 10s. a week free of tax was to subject the husband to a gross liability of £10 a week at the rate of tax in force when the order was made and that what the judge had intended was that the sum of £5 10s. a week should reach the wife free of any deduction and not that she should receive £5 10s. a week, plus income tax relief on the tax deducted; that the proper order to make was a gross order, which in the known circumstances at the current rate of tax would give to the wife a figure approximating to that which the court intended her to have after her income tax allowances were taken into account; and that the figure of £5 10s. free of tax should be deleted from the order and the figure of £7 less tax should be inserted in its place.

Order of Sachs J. [1955] 2 W.L.R. 973; [1955] 2 All E.R. 85 varied.

SUMMONS (adjourned into open court): Cross-appeals by husband and wife in maintenance proceedings from an order of the registrar.

The parties were married in May, 1940, the husband marrying for the second time at the age of 36, the wife being 20. There were two children of the marriage, a girl born in 1941, and a boy in 1943: the wife had the custody of both children at the date of these proceedings.

In September, 1949, the husband left the wife and on October 14, 1949, she presented a petition for divorce on the ground of the husband's adultery in August and October, 1949, with one Mrs. W., who had been his secretary and with whom he had been associating since 1946. On November 3, 1949, the petition was ordered to be heard as an undefended cause. No further step was taken until in December, 1952, the wife obtained leave to amend her petition by asking for the discretion of the court in respect of adultery committed by her in 1949 before the filing of her petition. A discretion statement (not the one filed) was signed in December, 1952.

On the break-up of the marriage in September, 1949, the wife and children had been left in the matrimonial home, a three-bedroomed cottage on an estate bought by the husband in 1948 and vested, as stated below, in a company. In January, 1953, under pressure of the threat of eviction proceedings in the name of the estate company (in liquidation) the husband secured the eviction of the wife and children from the cottage and went to live there himself with Mrs. W., whom he later married.

In February, 1953, the husband filed an answer alleging at length by way of defence connivance, condonation, collusion, and unreasonable delay; he cross-prayed for a divorce on the ground of adultery by the wife. In May, 1953, after she had obtained legal aid and changed her solicitor and counsel, the wife filed a reply setting out details of her refutation of the allegations made by the husband by way of defence. In June, 1953, she amended her petition to charge her husband with adultery from 1946 onwards and filed a three-page supplemental petition, alleging first, adultery by the husband with Mrs. W. after the date of her original petition, and secondly, cruelty. The bulk of the charges of cruelty had reference to the husband's relations with Mrs. W., his failure to give up Mrs. W. despite the wife's entreaties, and his persistence in the association. Reference was also made to the circumstances of the wife's eviction from the former matrimonial home, and to certain financial matters. The discretion statement before the court was signed on July 3, 1953. On October 16, 1953, the answer was struck out on the husband's application, and on December 17, 1953, the wife was granted a decree nisi in an undefended suit on the ground of adultery, the allegations of cruelty not being pursued. The decree was made absolute on January 24, 1954.

The following summary of the history of the husband's business interests during the marriage is taken from the judgment of Sachs J.: In 1940 the husband was a branch manager of an insurance association at a salary of £750 per annum with a car. In 1943 he went into the employ of an insurance company, starting at £1,000 per annum, and by 1948 he was its managing director at £3,500 per annum plus car and expenses. In 1948 the husband left this employment and shortly afterwards bought for £29,500 an estate, vested it in a company of which he owned all the shares except four, and furnished and equipped it as a country club at a cost put by his counsel at a further £12,000. All but about £4,000 of this sum appeared to have been borrowed. The husband and wife lived on the estate and both joined in the work of running the club. In March, 1949, a bad fire destroyed a large part of the club; and in September, 1949, the marriage broke up on the wife finding that he was continuing to commit adultery with Mrs. W. despite a series of promises made after the wife had discovered the association in 1946.

From 1949 onwards the husband busied himself with the affairs of the company, against which a compulsory liquidation order was made in April of that year. As between cutting his losses and leaving himself free to return to an insurance office, and making what he could out of the estate, he chose the latter course. The property was conveyed to him in May, 1953: by the end of 1954 he had sold various houses on it for £12,500: and the main building and the cottage in which he lived were being reinstated and converted under a £17,500 building contract. The value on completion of the property was assessed in a valuation of October, 1954, at £34,800.

In February, 1954, the husband embarked upon a further building project, called in the judgment the " S.W. Scheme." He acquired a bomb-wrecked site in a square in London, S.W., for about £10,000, where he was erecting some seven houses. (The £40,000 finance for this project, and the financing of the estate project, is considered in the judgment of Sachs J.) The husband averred that he expected on completion that there would be a " substantial profit," so that the completed value of the houses would be in excess of £50,000.

In addition to these properties the husband referred in oral evidence before the registrar to two further development schemes in which he appeared to be concerned. The registrar's note read: " Buckingham Scheme . . . 3 conversion 9 new houses; " West End Scheme . . . 17 new houses 9 mews conversion."

The wife did not enter into employment outside the matrimonial home while the parties were living together except in so far as she assisted her husband in the joint enterprise of running the country club before the fire. She later sought training to become a saleswoman with a well-known firm: but she had to give up the employment (which she obtained) in August, 1954, owing to an operation which affected her feet, and in respect of which, and of subsequent treatment, she incurred liabilities of £147 which were met at first instance by her father. It appeared from the evidence that she was available for sedentary work, but the only subsequent employment she obtained was a temporary post at £8 a week at an exhibition. She had no other income, and lived with her parents in a small flat. The son stayed there during school holidays; it was impractical for the daughter, who had had to go into a National Health Scheme institution, to stay there at the same time; and the wife was anxious to have accommodation of her own. The husband had ceased to make any payments to her after September, 1952. Mrs. W., who married the husband in April, 1954, was not herself going out to work, and her son by her previous marriage was boarded out with a relative at £2 a week, £6 a month being received from the father for the boy's maintenance.

The wife applied for ancillary relief, and on June 24, 1954, the registrar made an order for discovery including special reference to the country estate. No reference, however, was made to the " S.W. Scheme " which had not at that stage been disclosed to the court. The husband swore a short affidavit of documents on September 15, 1954, which contained nothing to show the sale of parts of the estate (some £10,000 worth had been sold by early 1954), no reference to the " S.W. Scheme," and no copies of income tax returns or tax assessments. On October 29, 1954, counsel for the wife pressed for a proper compliance with the order for discovery; this was successfully opposed, the husband being tendered for cross-examination. At the hearing of the wife's application counsel for the husband was allowed to open it and to examine him at length in chief. No schedules supported by original documents or oral evidence had been prepared by the husband, who failed also to provide the court with a clear-cut picture of his present schemes and the results he planned, or to give clear explanations of his current expenditure.

On February 9, 1955, the registrar, who came to the conclusion that the most he could regard as available in determining the husband's ability to pay could not exceed £800 a year, from which the sum of £240 a year for the maintenance and education of the children of the marriage was to be deducted, made an interim order for maintenance in the sum of £2 a week under another order.

Gerald Reed and *Henry Thomas* for the wife.
Joseph Jackson and *J. C. J. Tatham* for the husband.
Argument was in chambers.

Cur. adv. vult.

March 18. SACHS J., reading his judgment, said: These cross-appeals from an interim order for maintenance in favour of the wife raise two main issues. The first is as to how to interpret and apply the phrase " ability of the husband " in assessing what is reasonable for him to pay for the support and maintenance of the wife: the second is as to what can properly be taken into account in relation to the conduct of the wife in assessing that sum.

The first point involves the questions whether " ability " includes in the special circumstances of this case " ability to " overdraw," and if so, how far it is reasonable to rely on this husband increasing his overdraft or otherwise obtaining loans: the second includes questions as to whether it is or is not right to take into account delay on the part of the petitioning wife in filing a discretion statement, the fact that the wife at a late stage of the proceedings charged the husband with cruelty, but did not pursue that charge when the case became undefended as regards the husband's admitted adultery, and what the registrar referred to as the "lack of sincerity" of the wife. The case is one of complexity, particularly on the financial side, and has followed as regards the pleas of the parties a long, tortuous and by no means stereotyped course. As a result the investigation before the registrar of an application issued by the wife in May, 1954, took three days and the argument before me occupied in the aggregate some 23 court hours spread over six days. The cause of that regrettable state of affairs I will discuss later.

[His Lordship referred to the facts of the marriage, and to the history of the husband's business interests as set out above, and continued:] It is convenient first to deal with the second point—the conduct of the wife. As to this, the registrar says in his helpful written note of the reasons for his decision: "Counsel for the "respondent urged strongly that regard should be had to the "conduct of the petitioner; when she first filed her petition she "omitted to ask for the exercise of the court's discretion. She "subsequently obtained leave to do so, and her failure to plead "cruelty until a subsequent date would, as the husband's counsel "put it, indicate some lack of sincerity on her part. I feel bound "to hold that the wife's conduct is a factor which I think must be "taken into account." The only reasons which the registrar there appears to specify as against the wife relate to the course of the divorce proceedings. [His Lordship referred to the history of the proceedings, and continued:] Neither on authority nor on principle does it seem that mere delay in filing a discretion statement can of itself affect the wife's right to maintenance. Nor in this case can I see any reason why it should. That delay can constitute matter as between the wife and the court to be taken into account on the issue as to whether the court should exercise its discretion: it cannot be taken into account as between the parties under the heading of "conduct of the parties" in section 19 (2) of the Matrimonial Causes Act, 1950. Equally, while leaving open the question whether the bringing of gross unfounded charges in the course of the proceedings might not be taken into account, it seems to me wrong in this case to seek to hold against the wife that she made but did not in a then undefended cause unnecessarily proceed with a charge of cruelty so closely linked on the facts with the adultery on which she gained her decree.

Next it is to be noted that the reasons given by the registrar refer to "lack of sincerity" on the part of the wife. If lack of sincerity cannot affect the grant of the decree nisi—and in this case it could not—I doubt if it can affect the question of maintenance. But, anyway, the registrar was not referred to any of the cases, such as *Clifford* v. *Clifford*,[1] in connexion with the meaning in matrimonial causes of the words "lack of sincerity" and, in particular, its relationship to estoppel. There is no factor in evidence in this case that could entitle the husband to raise a plea of "lack of sincerity" in relation to the wife's claim for maintenance. Accordingly, with all diffidence, in that I am differing from an experienced registrar, I consider that he misdirected himself in law when dealing with the wife's conduct, and I must look at that aspect of the case de novo.

Accordingly, there fall to be considered further points which Mr. Jackson has urged in relation to the wife's conduct. As regards these I should first mention that I have had the advantage of reading the husband's discretion statement, a document apparently not referred to before the registrar. It contains some illuminating admissions as to the persistence of the husband in his adultery from 1945 onwards with his then secretary, Mrs. W. —with whom he has lived as man and wife since 1951.

The statement lays against the wife as leading to that adultery pre-1945 coldness and lack of affection, coupled with her being a party to "unpleasant incidents" as between the husband and her parents. These allegations are not particularized (as to which see *Duchesne* v. *Duchesne* [2]), have not been put on oath in the course of the maintenance proceedings, and are allegations which the wife neither has had nor could have had an opportunity to deal in the course of those proceedings. The husband did not refer to them in his long examination-in-chief. Incidentally, it is common ground that the registrar was asked to consider the conduct of the parties on the documents before him—and these did not refer to the above allegations.

Before me Mr. Jackson did not suggest that conduct of the wife was a contributory cause to the break-up of the marriage, but I have considered that possibility. Noting that both parties seem to agree that difficulties started in 1943, when the husband first joined an insurance company where Mrs. W. was his secretary, and that the wife says that the husband as from that date ceased to have sexual intercourse with her, I have no doubt that the husband's attachment to Mrs. W. over a period of many years was the true cause of the break-up of the marriage. Having rid himself of his wife and his children too, and put Mrs. W., his third wife, in their place, the husband cannot, in my view, succeed in any attempt to put on the young wife any material part of the blame for the break-up.

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[1] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.

[2] [1951] P. 101, 115; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784.

In those circumstances, can he in this particular case in the maintenance proceedings successfully fall back on the wife's admitted misconduct? The wife's conduct was very reprehensible—but it followed on six years' lack of sexual intercourse and of unhappiness, and the husband's conduct was indeed black. So the wife's conduct not being a cause of the break-up I see no good reason for penalizing her now that her adultery with the man in question has long ceased—at any rate in the ranges of figures here under consideration, where any discount off the husband's liability would, in any event, be but small (see *Duchesne* v. *Duchesne* [3]). In this I am glad to find myself in agreement with the experienced registrar, who by implication also rejected Mr. Jackson's argument on this point. Further, having since coming to that conclusion made inquiry, I am fortified by the knowledge that the conclusion is in no way inconsistent with the way in which such problems are currently regarded in maintenance proceedings.

In considering the wife's conduct I have, of course, noted that the husband asked for the offensive allegations in his answer to be struck out. Not only was that an admission that his version of how his wife behaved in relation to his association with Mrs. W. constituted a false charge, but he is in law precluded from alleging otherwise—for the reasons given in *Duchesne* v. *Duchesne*.[4]

That being the position as to the husband's allegations in his answer and the story as set out in the particulars, I see no reason why, in acceding to Mr. Jackson's request to take into account the facts detailed in the discretion statement, I should not have regard to the wife's statement that she begged the husband to give up Mrs. W., but that she could not break up the association, or that the marriage was reasonably happy till the husband met Mrs. W. In fact, I reached my general conclusion from other material—but those passages support it.

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[3] [1951] P. 101, 114.

[4] [1951] P. 101.

Finally, at Mr. Jackson's request, I record his unusual submission that I should reduce the wife's maintenance (under the heading still of her "conduct") because of an alleged false statement in an affidavit as to the urgency of an operation to her feet. I reject the suggestion that the accuracy of statements in maintenance proceedings as to means or potential means can affect the proportion of the husband's means to be paid to the wife. It might incidentally be a poor look-out for many husbands if I held otherwise—and an especially poor look-out for this particular husband.

Before leaving this issue as to the conduct of the wife it is desirable to refer back to the lack of particularization of the allegations made against her. There is no trace in the husband's affidavits that he was going to rely in any way on allegations against the wife in order to discount his own liability. In *Duchesne* v. *Duchesne* [5] the need for proper particulars is mentioned. Further, in Latey on Divorce, 14th ed., p. 246, the principle involved is well stated in broad terms as follows: "The "charges should be made with precision in the husband's "affidavit. If the wife denies them there should be an order "for oral evidence before the registrar." A practice commonly followed at present is to refuse to allow allegations relating to the wife's conduct to be raised upon an application for maintenance unless proper notice has been given by affidavit or otherwise. If such notice has been given, an order that an issue on the subject be tried can, if necessary, be made or the matter can be dealt with in the course of the hearing of the summons, according to the nature of the case. That practice I would commend.

In the present case I would not myself have permitted an argument that ranged over a wide area of un-particularized allegations but for the fact that in some form or other issues relating to conduct had in fact been canvassed before the registrar. Whether or not the facts relied upon by a husband are later found to be in controversy, it is obviously highly desirable that any charges made should be reduced to writing in a form enabling first the wife's advisers to consider before the hearing how to meet the charges, and later an appellate court to know precisely what the charges were.

At this stage it is convenient to dispose of an additional point on which argument was addressed to me. Mr. Jackson stressed the earning capacity of the wife—a factor to which the registrar referred and in conclusion dealt with in these words: "taking into account therefore . . . her potential earning "capacity," a capacity he treated as one of the three main factors in assessing the amount to be paid. Whether he took into account her full earning capacity (as might be thought from the word "potential" as used without any modification) or not, is not fully clear.

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[5] [1951] P. 101, 115.

[His Lordship considered the position of the wife, and her business experience, as set out above, and continued:] Applying to this situation the guidance available from the judgment of Lord Merriman P. in *Ward* v. *Ward*,[6] and the judgments of the Court of Appeal in *Rose* v. *Rose*,[7] I take the view that the wife is not under an obligation in the circumstances to go out and earn, and that if she does obtain employment the husband is not entitled to have the whole amount of what she earns taken into account in any calculations which affect maintenance. On the other hand, I propose to assume that she will work when she can and that there should accordingly be some "discount" applied to whatever amount would otherwise be ordered against the husband as regards maintenance.

I felt but small attraction for the argument that this husband was entitled to insist on the mother of his children adopting regular employment, whilst those children are in her custody. It seemed an even less attractive proposition when one realized that this husband was living alone with his present wife in a cottage being reconstructed and added to at his expense, the present wife—a trained secretary—neither going out to work nor having in her home her own son, aged 12. That son was being boarded out with an aunt: and, indeed, the husband asserts that £2 a week for 52 weeks should be taken into account for the expense he pays for boarding out that stepson. As the present wife's former husband is paying her £6 a month for him I may say that on the evidence before me the claim that this £2 a week should all have priority over the (applicant) wife's right to maintenance seemed a little unreal.

I now turn to the main issues in the case—those relating to the financial position of the husband. Before, however, one can proceed to an analysis of the vital figures and facts on which a decision must turn, it is unfortunately necessary to deal with

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[6] [1948] P. 62; 63 T.L.R. 647; [1947] 2 All E.R. 713.

[7] [1951] P. 29; 66 T.L.R. (Pt. 2) 440; [1950] 2 All E.R. 311.

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the questions argued as to the husband's veracity. In the upshot I doubt very much if, for reasons later stated, conclusions on this subject materially affect the ultimate result. But so long and so hot has been the contest that it is my duty to deal with it, for the assistance of any appellate court to which this case may go.

[His Lordship said that he started his examination of the facts on the basis that a man who rose to be the mainspring of an insurance company was a very able man; that from his methods of conducting recent large property-development enterprises he must obviously be a man of special financial talent and of commercial integrity, that in addition, his insurance experience was such that he must have had not only high knowledge of what was important in assessing a financial situation, but acute awareness of the meaning of figures and of how to be exact. His Lordship referred to the absence of proper schedules and explanations and continued:]

When the matter came on for hearing, Mr. Jackson persuaded the registrar to allow him to open the wife's application and let him conduct a lengthy examination in chief of the husband. To one familiar with the difficulties in which counsel are involved if they have to cross-examine upon and probe a highly involved financial situation without having first had proper discovery, that order of October 29, 1954, and the resultant procedure must seem bound to result at least in a severe handicap on the wife, and most likely in confusion, too. In such circumstances as the present a husband must, if practicable, be forced before cross-examination to comply with orders for discovery. The husband's grossly inadequate affidavit of documents, coupled with the resistance to correcting the defects and the gaps in the husband's evidence-in-chief, has resulted both here and before the registrar in a disastrous and unnecessary waste of court time on intricate figures and facts, and here in wholly otiose conflicts as to what documents were available to and put in before the registrar.

From amongst this confusion, however, certain facts emerge in the end with clarity. First, that this is a man who outside commerce does not necessarily apply the integrity of commerce. As regards tax matters, where P.A.Y.E. is concerned, he says he paid a man "£7 10s. officially, but he got £11," i.e., he paid some 45 per cent. more than he told the revenue authorities. Secondly, that in paragraph 6 of his affidavit of June 23, 1954, already quoted, he swore facts as to his activities that he knew to be untrue. Thirdly, that in paragraph 3 of that affidavit he seeks to give an impression of financial stringency that hardly tallies with the position as I will later detail it. Fourthly, there remains a complete absence of books of account on any topic. In the upshot, on the documents as now analysed in a way that was perhaps not practicable on their first impact at the hearing before the registrar, I have no hesitation in concluding that in his attempts to minimize his ex-wife's claims the husband has been devoid of frankness and, indeed, generally unreliable.

Having, for reasons above indicated, my views on the husband's veracity, I repeat that they do not materially affect the result.

In cases of this kind, where the duty of disclosure comes to lie on a husband; where a husband has—and his wife has not—detailed knowledge of his complex affairs; where a husband is fully capable of explaining, and has had opportunity to explain, those affairs, and where he seeks to minimize the wife's claim, that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference—especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative. Had I simply proceeded on that footing my findings would have been little, if at all, different from those I have reached after coming to the conclusion above stated as to the husband's frankness and reliability. To the above duty of disclosure, and the consequences of non-compliance, I will later have to refer further.

Now, at length I can pass to what must unfortunately be a detailed task—such analysis of the figures in evidence as that evidence permits. In the main these figures relate to two topics—first, his capital position, secondly, his expenditure on household, personal affairs, and on other matters which do not solely come under the heading of "business expenses."

At the outset it should be stated that, according to a letter referring to his income tax returns, his (taxable) income was: 1951/2, £44; 1952/3, £69; 1953/4, £60. As to this there is, as previously noted, an absence of any copies of income tax returns, or any proper material as to how his returns were computed; in the sketchy documents put in evidence there is, for instance, no trace of the figure at which he put his business expenses, or of his loan and overdraft charges in 1952/3 and 1953/4. It should, however, be made clear at this stage, that whilst the bank accounts disclosed show on the face of them relatively small balances, either in black or in red, in substance the husband is, and has been for some time, living and carrying on business on money borrowed on a large scale. But no banker of his has been called, and the court's knowledge of the size of the loans and the security pledged against them is incomplete. No direct evidence was given as to how much more he is entitled to borrow or can reasonably expect to borrow.

[His Lordship then considered in detail the nature of the husband's business transactions, his capital position, and his current expenditure. Referring to the manner in which the husband had presented the facts to the court, his Lordship said:] The effect has been that owing to the husband's grossly defective affidavit of documents, his failure to put before the court documents; the reticencies in his long examination-in-chief, and his complete omission to keep or to produce (I know not which) books of account, there have been kept from the court vital facts which he ought to have made plain. His attitude, to my mind, has been throughout an attitude of "catch me if you can." In substance, he sought to give the impression of a man barely subsisting in a Nissen hut, and then to say "disprove that and "the consequent inferences if you can."

Mr. Jackson has put the husband forward as a man who, in person or by his representatives, would provide any information—if asked. That happens to be a submission not exactly borne out on a detailed examination of the course of events. As to that, it is not so much even (as is the fact) that certain specific requests in correspondence have elicited no reply, and that arrangements promised have not been kept—but the general tenor of what happened. Very many things, including some of Mr. Jackson's arguments, and his reliance on certain questions not having been put in cross-examination, point to a misapprehension of a basic principle.

For a husband in maintenance proceedings simply to wait and hope that certain questions may not be asked in cross-examination is wholly wrong.

In the light of this apparent misapprehension it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when that evidence is led by those representing the husband) the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings—in so far as such inferences can properly be drawn. A fortiori that is the position where the effect of the husband's attitude is as previously stated.

The result is, that having regard to benefits in "meal and "malt," the husband and his wife appear to be adopting a standard of about £1,100 per annum, with a car in addition. This is a stage at which I part company on figures with the basis adopted by the registrar, who did not have the benefit of certain tables and lists prepared during the hearing of this case at my invitation. [His Lordship referred to the registrar's finding that the husband had at most £800 a year available from which the maintenance of £240 a year for the children was to be deducted, and continued:]

Those being the facts, the question arises as to what is the law applicable. On this aspect of the case much assistance was given to me by both counsel. Indeed, it is right to record that whilst the argument for the husband had on facts and figures failed to crystallize save upon invitation, when it came to legal points it was full, lucid and interesting.

For the wife it was submitted that there was ample evidence on which the husband had been shown able to pay to his wife maintenance at an annual rate of £500. Indeed, whilst in his first address Mr. Reed put the upper limit at £500, and expressed his willingness in effect to accept a compromise, in his closing address he suggested that a figure in excess of £500 per annum could be ordered. A summary of his argument was that the husband was a man of large assets, and that his capacity to pay had been established by his own expenditure. He also put forward certain submissions as to what were the capital profits the husband was earning, and what were the likely sums that would be received when the two estates were bringing in revenue—if the husband was aiming at a revenue-producing investment.

For the husband, on the other hand, it was submitted that there should be no more than a nominal order made against him, and that the wife should be left to apply again when the husband had informed her that the projects, or at any rate one of them, were completed. He urged that it was wrong in principle to order maintenance where there was no income, no capital from which income could be derived, and no capital which could be trenched upon to produce an annual payment. Apart from that, he did not submit any misdirection on law or fact by the registrar, and prayed in aid the figure of £800 to which I have previously referred. As regards the potential further overdrafts, he submitted it was wrong to put pressure on the husband to use moneys given for one purpose in order that they might be turned to another, i.e., the maintenance of the wife: also that it was not right that the husband should, at the court's instance, have to borrow money in order to provide for a former wife.

The application to the registrar was made under section 19 (3) of the Matrimonial Causes Act, 1950. His order very properly was made as an "interim order"; both counsel have invited me to review the position on the footing that I am concerned with the proper payment to be made for a year or so from October 1, 1954; and this seems to me a correct attitude.

Both counsel have argued on the basis that though section 19 (3) is phrased differently from section 19 (2), yet in determining what "the court may think reasonable" under subsection (3) the court takes into account the three factors referred to in subsection (2), viz.: the fortune, if any, of the wife, "the ability "of her husband," and "the conduct of the parties." That basis is the correct one, as is shown by many authorities—notably *Chichester* v. *Chichester*[8]—though not always so stated expressly in them. Thus decisions on applications under subsection (2) in so far as they deal with those phrases may well be relevant to cases arising under subsection (3).

The fact that the present issues in this particular case arise on an interim order only affects the matter by avoiding the need of estimate beyond October of this year.

The first point is as to the meaning of the "ability of the "husband" in relation to the facts as found by me. No decision involving reasonably parallel facts has been found, but I derive considerable assistance from passages in the judgment of Lord Merrivale P. in *N.* v. *N.*[9] There he was considering (under the 1925 Act equivalent of the above section 19 (2)) the way to regard income which the husband had alienated by settling it on his second wife. The facts were quite different, especially in so far as they relate to a stratagem adopted by the husband, but that does not detract from the value of the guidance given in general terms.

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[8] [1936] P. 129; 52 T.L.R. 265; [1936] 1 All E.R. 271.

[9] (1928) 44 T.L.R. 324.

In his judgment Lord Merrivale P. treats "ability" as broadly interchangeable with the word "faculties" as used by the Ecclesiastical Courts when they were still seized of matrimonial causes and he states in relation to their decisions on maintenance issues[10]: "The Ecclesiastical Courts showed a "degree of practical wisdom. . . . They were not misled by "appearances . . . they looked at realities. . . . The court not "only ascertained what moneys the husband had, but what "moneys he could have if he liked, and the term 'faculties' "describes the capacity and ability of the respondent to provide "maintenance. . . ." Then bearing in mind, as he stated, that he was applying the then relevant statutes, he says[11]: "I conceive that I must take into consideration the position in which "they were and the position in which she was entitled to expect "herself to be and would have been, if her husband had properly "discharged his marital obligation. . . ." In another passage these phrases occur[12]: "Here is an interest in a great business. "Here is great business capacity. All of these are advantages "to which the wife during the marriage, the petitioner, was "legitimately entitled to look forward. They are not accidental "accessions of fortune. They are benefits which have arisen "during the course of years, and by the development of the "husband's faculties and position he has got the sum which has "been spoken of as available."

That case was cited but distinguished by du Parcq L.J. in *Howard* v. *Howard*,[13] which concerned moneys held by trustees on protective trusts. It was decided that the court ought not to seek to force independent trustees to exercise their discretion otherwise than they felt right. Mr. Jackson relied on that case as showing that the court ought not to seek to force the bank to give this husband further credit—but, to my mind, the analogy fails. What is being considered here is not the independent discretion of a trustee but the ability of the husband to enter into a contract with a bank or other potential lender, i.e., his own capacity to provide money, not someone else's. Further, I note that in *Howard* v. *Howard*[14] the court was prepared to take into account sums which trustees in their discretion in fact paid to the husband.

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[10] 44 T.L.R. 324, 327.

[11] Ibid. 328.

[12] Ibid.

[13] [1945] P. 1; 61 T.L.R. 189; [1945] 1 All E.R. 91.

[14] [1945] P. 1.

Next Mr. Jackson relied on *Barker* v. *Barker*,[15] but there is no cause here to make an order that is vague or uncertain, or one which will have that "palpably absurd or oppressive" result with which *Barker* v. *Barker*[15] was concerned in relation to "security."

I would add that all the modern cases cited by Mr. Jackson related to the ordering of security where the husband had moneys out of which unsecured maintenance was in fact ordered, and must, of course, be examined in that light. Thus, for instance, Mr. Jackson urged that the emphasis of the judgment in *Shearn* v. *Shearn*[16] and other authorities lay in phrases referring to "present income"—but one must read such judgments in relation to the practical points to be decided. Little assistance can be derived from reference to such phrases when the husband was earning an income independently of the property which it was sought to bring into the net of "security"—and *Shearn* v. *Shearn*[16] concerned a professional man earning £2,400 a year and there the real issue was whether or not he should be ordered to give security upon property producing no income. There Hill J., in considering whether or not to order security, was examining, inter alia, the relative advantages to the wife of so doing or of refraining from so doing.

In relation to the word "ability" Mr. Reed, in addition to *N.* v. *N.*,[17] referred me to *Klucinski* v. *Klucinski*,[18] a Divisional Court case where Lord Merriman P., in relation to the husband's capacity to earn by working overtime, said that his "earning "capacity" must be taken into account. Attention was also called to Lord Merriman P.'s phrase in *Chichester* v. *Chichester*,[19] where in relation to the facts there under consideration he observed parenthetically as to the word that it "means "ability to pay of course"; and to Lord Greene's words in *Howard* v. *Howard* where he says[20]: "What has to be looked "at is the means of the husband, and by 'means' is meant what "he is in fact getting or can fairly be assumed to be likely to "get." And finally I note that the word "ability" in relation to financial matters was already in use in a pecuniary connotation in 1857 in another statute, viz., section 6 of the Statute of Frauds Amendment Act, 1828, and that in *Lyde* v. *Barnard*,[21] Baron

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[15] [1952] P. 184; [1952] 1 T.L.R. 1479; [1952] 1 All E.R. 1128.

[16] [1931] P. 1.

[17] 44 T.L.R. 324.

[18] [1953] 1 W.L.R. 522; [1953] 1 All E.R. 683.

[19] [1936] P. 129, 133.

[20] [1945] P. 1, 4.

[21] (1836) 1 M. & W. 101, 112.

Parke said that the word "means in its ordinary sense some "quality belonging to the party in question."

From these authorities it appears that the word "ability" —so carefully used in the statute without adjective or ancillary words—should be broadly construed in the light of the realities of each case. It seems highly inadvisable to try to list or define the many varying elements that may constitute "ability" to provide maintenance—especially as each generation has its own ways in relation to money matters. Suffice it to say that ability, in my view, undoubtedly may include in certain circumstances ability to provide money by overdrafts or through loans. One cannot follow the precept "look at realities" and at the same time shut one's eyes to the fact that as regards a section of the business community this is to some degree an age of overdrafts and capital gains. Thus in the present case we have a typical instance of a man who is earning capital gains with the aid of his ability to obtain overdrafts. Such men and such occupations are far from unknown—and include those who acquire reversionary interests of various types upon borrowed money. They may live more than comfortably without being possessed of salary, of dividends or of assets readily realizable for sums much in excess of their overdrafts.

Next I turn to the degree of pessimism or optimism to apply to the husband's prospects. There was cited for the wife Lord Hanworth's judgment in *Sherwood* v. *Sherwood*,[22] which concerns a professional man suffering from temporary misfortune. There, in looking much further into the future than I am here called upon to do, he says "Is it not right to take into "account not merely those features which would be regarded "by a pessimist, but also those features which would be regarded "by an optimist?" In that case, where definite evidence was lacking through no fault of the husband, the answer was an affirmative one: in the present case, too, one must take a balanced view.

Having regard to the authorities mentioned the summary of the relevant factors may be thus stated. The husband has assets of high value, he is a property developer of initiative and resource, he is obviously seeking to earn by capital gains, and he appears to be well on the way to making such gains. He has assets of high value and he has an outstanding ability to secure loans and overdrafts. As to the limits of the latter available to him, no limits have been put in evidence, and nothing in the evidence leads to the conclusion that money is being advanced to him by Barclays Bank solely for the purpose of expenditure in his business—on the contrary, the inference to be drawn from the evidence available is that it is open to him to overdraw in respect of his general expenditure and that no questions are being put to him as to how the money he draws is being spent.

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[22] [1929] P. 120, 126; 45 T.L.R. 53.

If that were all that was known the matter of assessing the order proper to be made for the benefit of the wife would still be one of difficulty. The difficulty would have been to assess what was the reasonable sum which the husband could be expected to devote each year to his non-business expenses. In this case, however, there is available the previously analysed material relating to his non-business expenditure and the standard of living of the husband and his wife. Their standard during 1954 was clearly in excess of £1,000 per annum tax free plus a car. His non-business expenditure exceeds that sum and, indeed, one way or another there is much to be said for looking at the husband as a £1,500 a year man—or something like that—all tax free. To that extent he has to no small degree provided the court with his own assessment of his available means. There is no reason to suppose that either his capacity to spend or his above standard either need be or will be curtailed as his two first projects approach completion.

What, then, is a reasonable figure for the second wife, if one bears in mind the words of Lord Merrivale P. in *N.* v. *N.*[23] as to taking into account what would have been that wife's position if her husband had properly discharged his marital obligation? Certainly she should not have been penniless (as Mr. Jackson in effect suggested she should be) or provided for by a mere £2 a week. But what is reasonable for him to pay his wife in the particular circumstances is yet a matter on which there may be a "generous ambit within which reasonable disagreement is possible" (to use the words of Asquith L.J. when he dealt so clearly with an analogous point in *Bellenden* v. *Satterthwaite*[24]). Again, the just discount to apply in respect of the wife's earnings is a matter susceptible of a bracket when it comes to figures.

After taking all factors into account I found myself faced with potential upper and lower figures for the ultimate result that varied by at least £150 per annum. My own figure is taken from well inside the lower half of that bracket and is £5 10s. per week. In adopting that figure I have not excluded from consideration the husband's general position, nor the wife's, who also has debts—nor the fact that as my order will be effective from September 1, 1954 (the date the wife's salary ceased), it will create arrears. After having since September, 1952, paid nothing for this wife's maintenance, the husband from November 30, 1954, to date has paid £26 17s. 6d. in all. So the arrears from September 1, 1954, to March 21, 1955, will amount to some £160, which I consider should be paid by monthly instalments of £30 each.

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[23] 44 T.L.R. 324.

[24] [1948] 1 All E.R. 343.

The appeal of the wife is accordingly allowed and the registrar's interim order is varied by ordering maintenance at the rate of £5 10s. per week free of tax from September 1, 1954; the first payment at the current rate should be made on March 25, 1955. The arrears created by this order are to be paid separately and in addition to the £5 10s. per week as follows: first instalment of £30 on April 5, thereafter £30 a month on the 5th day of each month, the final arrears payment of course being an odd sum.

In order to pay £5 10s. per week, obviously the husband need overdraw at no greater rate than he has been doing and yet maintain an appropriate standard of living. Alternatively, if in so far as he may prefer to overdraw further, I have no doubt that he can provide both current maintenance and arrears with the same ease as he did a hire-purchase deposit for and the cost of a new engine for the 21 h.p. car he chooses to run. The cross-appeal of the husband is dismissed.

The reasons leading me to make the order "free of tax" need, in the circumstances, no amplification. Indeed I do not imagine that the order in favour of the children would have been in its present form had it been realized at the time that the husband would seek so to interpret it that he would deduct tax that he had never paid. The result of his so doing is in effect to prevent the wife from obtaining the sum which the court intended her to have for the maintenance of the children.

From the conduct of this case and from the fact that I have been requested to adjourn this judgment into court rather than that I should give a brief statement of the result I arrived at, it has been assumed by me that this matter may be taken to an appellate court, despite the fact that the figure involved only relates to a single year. Accordingly, I have dealt with the whole matter at much greater length than would be necessary if I had not thought it right to provide as much assistance as possible to any higher court to which this case may go. Lest, however, it be said that I encouraged the idea of an appeal, it is right for me to make it plain that my view is to the contrary, having regard not least to the manner in which the case has been presented on facts, the expense involved in relation to the sum at stake, and the fact that the order is only an interim order.

By October of this year the husband will be able (if he so chooses) to present an exceedingly clear picture, at any rate as to the two schemes which I have discussed in detail, of his financial position—though what will be the position as to his other schemes cannot be forecast. I hope by then some degree of good sense will have prevailed, and that it will be practicable for the two parties to come to an agreement relating to some longer period than one year. In the meanwhile, the capacity of this man to provide the sum ordered seems to be quite undoubted on such evidence as he has thought fit to put before me.

As regards costs, a shocking waste of court time has resulted from the husband's failure to provide proper material as to facts and figures, and to a lesser degree from his failure to crystallize his case at the right stage. Whatever had been the result of the proceedings before me, I consider that at least half the costs would have had to be assessed as due to the way in which the case has had to be presented by reason of the husband's failure to clarify facts and issues at the proper stages.

Appeal of wife allowed.
Cross-appeal of husband dismissed.

J. B. G.

The husband appealed.

Gilbert Beyfus Q.C., *Joseph Jackson* and *J. C. J. Tatham* for the husband. This is an appeal against an interim order for maintenance. The husband is living on borrowed money and staving off a number of creditors while he is developing certain properties. Sachs J.'s order is based on the amount of money the husband was able to borrow from the bank for living expenses. His capital position is irrelevant. The registrar's order for maintenance at £2 a week should not have been disturbed. It was made on the assumption that the wife was capable of earning £8 a week. That is the assumption on which the maintenance should be assessed. An order should not be made which will result in pressure being put on the bank to lend additional moneys to the husband. There is no reported case where a husband having no income is treated as having an income. In some of the old authorities a son had to bring into account an allowance from his father. A man in receipt of £950 a year is in a different position to a man who borrows £950 a year. The wife's conduct should be taken into account in determining the maintenance payable to her and she should, in the circumstances, work so long as the husband is living on borrowed money. The principle of the decision in *Rose* v. *Rose*[1] has no application here. In that case the wife was an innocent wife, and it was held that a wife was under no obligation to go out to work in order to reduce the amount of maintenance payable by her husband.

The judge should not have directed the weekly payment to be made free of tax. The result of his order being in that form is that, when payment is grossed up by reason of the tax which the husband will have to pay, he will be under a heavier liability than the judge intended and the wife will be able to recover relief in respect of such tax, with the result that she will get more than he intended. The payment should not be tax free. [Reference was made to Rayden on Divorce, 6th ed., p. 563; *Shearn* v. *Shearn*[2]; *Wallis* v. *Wallis*.[3]]

Leonard Caplan Q.C. and *Gerald Reed* for the wife. If the weekly sum of £5 10s., which the judge ordered the husband to pay, is grossed up with income tax at the rate of 8s. 6d. in the pound, the gross sum payable is £9 11s. 3d. The correct way of approaching the husband's liability is to regard him, as did the judge, as a man earning £1,500 a year free of tax. In those circumstances, it is not unreasonable that he should be ordered to pay his wife £500 per annum gross. In a case such as this, where a man choses to exercise his talents to increase his capital position rather than to earn an income and does not inform the court clearly what that capital position in fact is, the only basis for assessing the maintenance he should pay his former wife is by reference to the standard of living which he feels able to adopt. It appears from *Duchesne* v. *Duchesne*[4] and *Bellenden (formerly Satterthwaite)* v. *Satterthwaite*[5] that a judge has a discretion to award a third of the joint incomes as maintenance. This is, in effect, what the judge has done in this case. He has properly exercised his discretion and his order should not be varied. [Reference was made to *Spilsbury* v. *Spofforth*.[6]]

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[1] [1951] P. 29.

[2] [1931] P. 1; (1930) 46 T.L.R. 652.

[3] [1941] P. 69; 57 T.L.R. 523; [1941] 2 All E.R. 291.

[4] [1951] P. 101; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784.

[5] [1948] 1 All E.R. 343.

Gilbert Beyfus Q.C. in reply. The judge in this case did not take into account the fact that the wife was granted a discretionary decree. [Reference was made to *Alhadeff* v. *Alhadeff*[7] and *Stokes* v. *Bennett (Inspector of Taxes)*.[8]]

Evershed M.R. I will ask Hodson L.J. to deliver the first judgment.

Hodson L.J. This is an appeal from an order of Sachs J. made on March 18, 1955, by which, reversing an order of Mr. Registrar Forbes for interim maintenance at the rate of £2 a week, he ordered the appellant to pay to his former wife interim maintenance at the rate of £5 10s. a week free of tax as from September 1, 1954, until October 1, 1955. The wife had obtained a decree of divorce on December 17, 1953, and an order for the custody of the two children of the marriage, in respect of whom maintenance orders had also been made. The order appealed from was made in the exercise of the judge's discretion conferred by the Matrimonial Causes Act, 1950, s. 19, reproducing corresponding sections of the earlier Acts.

[His Lordship read section 19 (1), (2) and (3), and continued:] The reference to the fortune of the wife, the ability of the husband and the conduct of the parties applies equally to subsection (3): compare *Chichester* v. *Chichester*.[1]

Since the appeal is against an order made in the exercise of the judge's discretion, the matter is not open to review, in the sense that this court can be asked to substitute its discretion for that of the judge. The position in this class of case was clearly stated by Asquith L.J. in *Bellenden* v. *Satterthwaite*[2]: "We are "here concerned with a judicial discretion, and it is of the "essence of such a discretion that on the same evidence two "different minds might reach widely different decisions without "either being appealable. It is only where the decision exceeds "the generous ambit within which reasonable disagreement is "possible, and is. in fact, plainly wrong, that an appellate body

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[6] [1937] 4 All E.R. 487.

[7] [1951] W.N. 367.

[8] [1953] Ch. 566; [1953] 2 All E.R. 313.

[1] [1936] P. 129; 52 T.L.R. 265; [1936] 1 All E.R. 271.

[2] [1948] 1 All E.R. 343, 345.

"is entitled to interfere. That is, I think, the principle which "emerges from the decision of the House of Lords in *Evans* v. "*Bartlam*[3] and *Osenton* (*Charles*) *& Co.* v. *Johnston*.[4]"

Mr. Beyfus, on behalf of the husband, has argued that the judge has so misconceived the financial position of his client that the court should interfere with his order and restore the order of the registrar before whom his client had been cross-examined at length on his affidavits. Further, it is said, the judge erred in failing to give proper consideration: (a) to the fortune of the wife, and (b) to the conduct of the wife. I am not persuaded that there was such misconception of the financial position, nor do I think that there was any failure on the part of the judge to give proper consideration to the matters referred to in the section. Subject to the form of the order, which appears not to carry out the intention of the judge and to have been based on a misunderstanding of the effect of the Income Tax Acts, I think therefore that the appeal fails. I will return later to the form of the order.

This appeal is concerned only with an interim order expressed to expire on October 1 next, but the application has already occupied many hours—indeed days—before the registrar, before the judge and before this court. A great deal of this time ought to have been saved. In particular, if proper discovery had been insisted on before the cross-examination which took place before the registrar, much profitless inquiry might have been avoided. Very great care was given by the judge to every detail in this case. In fact, it might perhaps even be said that, having regard to the comparatively short period which this order is intended to cover, it was scarcely necessary to travel at such great length over the details of this case.

The husband is a man who pays no income tax and, according to his income tax returns for the last three years, his total income was, for 1951/52 £42, 1952/53 £69, and 1953/54 £60. These sums were derived from insurance commissions. He was, however, a man who had in the past earned a salary of £3,500 a year plus expenses and had, before the order under appeal was made, been actively engaged in the development of landed property, one a freehold estate of 50 acres at Fulmer, in the county of Buckingham, which was conveyed to him in May, 1953, by the liquidator of a company of which he was virtually the sole shareholder, and the other a leasehold property in Hereford Square, South

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[3] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646.

[4] [1942] A.C. 130; 57 T.L.R. 515; [1941] 2 All E.R. 245.

Kensington, in which he became interested in 1953 and acquired in February, 1954, for £10,800. On completion of the development, the value of the Fulmer property has been assessed at an estimated figure of £34,800. No estimate has been given of the developed value of the South Kensington property. The development of these properties is said to be his occupation, involving continuous attendance and, according to his evidence, which was accepted by the registrar, made it reasonable for him to use a motor-car mainly for business purposes. A great deal of time was spent in endeavouring to ascertain the capital position of the husband, who has throughout taken up the stand that he is harassed by creditors and that he is insolvent in the bankruptcy sense, so that any order made against him threatens him with financial ruin. It is true that his debts, apart from his indebtedness to his bank, amounted to £7,600 in June, 1953. On June 23, 1954, he swore an affidavit which I will read: "On "April 8, 1953, I married Lily Constance Woodhurst. In August, "1953, I moved from my former address to Fulmer Chase where "I now live in a nissen hut on the Fulmer Chase property, con-"sisting of three rooms. My wife lives there with me. I pay no "rent and I support my wife as best I can." He did in fact move into a house after this affidavit was sworn. The next paragraph reads: "The position with respect to my overdraft has not "changed. Such moneys as I have for the support of my wife "are from the overdraft." In the next paragraph he sets out a list of miscellaneous liabilities, totalling £7,602. Paragraph 6 reads as follows: "I find the order of this honourable court in "relation to maintenance of the said children very difficult indeed "to keep up. If any further burdens are placed on me at "present I shall not know which way to turn. My time and "energies are fully employed in keeping off my creditors and in "trying to salvage something from Fulmer Chase, which has "proved a tragic failure as far as my financial position is con-"cerned, especially as I have no longer open to me the career "which I formerly pursued." Neither in this affidavit nor in any previous affidavit did he include any reference to the South Kensington property or to the loan of £12,000, to which I shall later refer. This affidavit cannot be regarded as an honest statement of his financial position. His time and energies were not then fully employed as he said, but rather very largely in the scheme for the development of the South Kensington property, which he had acquired four months earlier. On September 15, 1954, he made a defective affidavit of documents, and no proper discovery was given before his cross-examination.

The husband's counsel has complained that, although the judge had not the opportunity given to the registrar of assessing the husband's credibility, he (notwithstanding the acceptance by the registrar of his evidence) classified him amongst men of unquestionable commercial integrity, who may somehow justify to themselves most questionable methods on certain matters outside commerce such as the defeating of the claims of an ex-wife. Having regard to the contents of the affidavit of June, which I have read in extenso, and, in particular, having regard to its omissions, I do not think that the husband has much to complain about when language is used about him such as that employed by the judge.

Broadly speaking, the facts (so far as they have been ascertained) show that the deeds of his properties are pledged with Barclays Bank, who have, on that security, made him a loan of £12,000, now said to be reduced to a lower unstated figure, and that he is being financed by a building society up to £40,000 for the development of the South Kensington property, that some of the developed property on the Fulmer estate was sold early in 1954 (although no documents relating to the sale were disclosed in his affidavit of documents) and that he now lives in a small house on that estate with the wife whom he has married since the divorce. He has also a capital asset in the shape of an estimated claim against the Central Land Board for £4,500. The date when his ambitious schemes will fructify and yield a substantial profit may not be long distant, but the judge came to the conclusion, which is not challenged and with which I agree, that no order for maintenance, interim or otherwise, could sensibly be made at this time based on a capital valuation and a notional income attributed thereto. He based his interim order on the only material available to him, namely, the husband's current expenditure.

In considering the ability of the husband, he derived assistance from the language used by Lord Merrivale P. in considering different facts in *N.* v. *N.*[5] Lord Merrivale P. said: "The "ecclesiastical courts showed a degree of practical wisdom. . . . "They were not misled by appearances . . . they looked at the "realities. . . . The court not only ascertained what moneys "the husband had, but what moneys he could have if he liked,

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[5] (1928) 44 T.L.R. 324, 327.

"and the term 'faculties' describes the capacity and ability of "the respondent to provide maintenance." Later he said [6]—this passage, as the former passage, was cited by Sachs J. in his judgment—"I conceive that I must take into consideration the "position in which they were and the position in which she was "entitled to expect herself to be and would have been, if her "husband had properly discharged his marital obligation." In a later passage, also cited by Sachs J., he said [6]: "Here is an "interest in a great business. Here is great business capacity. "All of these are advantages to which the wife during the "marriage, the petitioner, was legitimately entitled to look "forward. They are not accidental accessions of fortune. They "are benefits which have arisen during the course of years, and "by the development of the husband's faculties and position he "has got the sum which has been spoken of as available."

I agree that Lord Merrivale P.'s words have application to a case such as this where a husband, by means of bank loans, is enabled to maintain a consistent standard of living over a substantial period. The standard here is, in my opinion, a proper and, indeed, the only guide to be followed by the court in making provision for the maintenance of the wife. The judge made a careful analysis of the figures of current expenditure and arrived at the conclusion, which was justified by the evidence, that, taking into consideration his non-business expenditure, there was much to be said for looking at the husband as a £1,500 a year man who paid no income tax. He did not, I think, base his final order on this figure. In an earlier passage in his judgment he stated his conclusion, again supported by evidence, that, having regard to benefits in meal and in malt, the husband and his wife appeared to be adopting a standard of about £1,100 per annum, with a car in addition. This last figure included a notional value for the house in which the husband lived, he having given no evidence to assist the court on this matter, but did not include an annual sum of £100 paid for the maintenance of the two children and £140 paid for school fees. These payments were also being financed by the bank in the same way as all the other expenditure of the husband over and above his income of about £50 a year (using the word "income" in its ordinary sense). Taking into account that the loan from the bank carried interest, the position appeared to be that, having regard to the possibilities (if not probabilities) of the future fruition of his development schemes, the husband was not travelling headlong to financial ruin by living on borrowed money, and the judge held that it was reasonable that the wife, other things being equal, should share in the moneys which the husband was able to use for current expenditure from time to time.

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[6] 44 T.L.R. 324, 328.

My conclusion is that the judge had evidence before him on which he could properly have reached the conclusion at which he arrived, that the husband's current expenditure for non-business purposes was at least £1,200 a year, and that he rightly formed the opinion that the registrar had taken a view too favourable to the husband in putting this figure as low as £800 a year.

There remains, therefore, the question whether he misdirected himself in any way as to the fortune of the wife or her conduct. As to her fortune, the wife had worked before her marriage at the age of 20. After marriage, her position, as found by the judge, was as follows: "I note that at no stage during her "married life did the wife enter into employment outside the "matrimonial home, except in so far as she assisted her husband "in the joint enterprise of running a country club during the "period before the fire. Having regard to her duties towards the "children and the fact that her husband was previously earning "a considerable salary, this is not surprising. After the marriage "broke up there came a time when the wife of her own initiative "sought training to become a saleswoman with a well-known "firm, but this employment she had to give up in August, 1954, "owing to an operation affecting her feet. In respect of that "operation and subsequent treatment she has incurred liabilities "of £147, which have been met in the first instance by her "father, who is about to retire. From then onwards there has "been a period when she has been unable to work. So far as can "be gathered from the evidence she is now available for sedentary "work, but so far has only secured a temporary post at £8 a "week at the Ideal Homes Exhibition. She has no other income. "She now lives with her parents in a small flat. This is a source "of inconvenience when the son comes on his holidays, and it "would not be practicable for the daughter, who has had to go "into a National Health scheme institution, to come there on "the visits which the doctor has advised she should make so as to "have the company of her mother and her brother. The wife "wishes to have accommodation of her own."

Having regard to a decision of this court in *Rose* v. *Rose*,[7]

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[7] [1951] P. 29; 66 T.L.R. (Pt. 2) 440; [1950] 2 All E.R. 311.

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and a decision of the President in *Ward* v. *Ward*,[8] Sachs J. stated his conclusion as follows: "I take the view that the wife is not "under an obligation in the circumstances to go out and earn, "and that if she does obtain employment the husband is not "entitled to have the whole amount of what she earns taken into "account in any calculations which affect maintenance. On the "other hand, I propose to assume that she will work when she "can and that there should accordingly be some 'discount' "applied to whatever amount would otherwise be ordered against "the husband as regards maintenance." I agree with this view.

So far as the wife's adultery was concerned, and its attendant circumstances, the wife's counsel on the appeal sought to argue that it was not open to the husband to raise it now, since his answer was struck out and he had not raised it at the trial. Reliance was placed on the decision of Pearce J. in *Duchesne* v. *Duchesne* [9] concerning an entirely different situation, namely, that of a respondent who sought to raise in maintenance proceedings matters not raised in the main suit for divorce, although he had had an opportunity so to do, and those matters would have been available to him as a defence. In this case the husband was clearly entitled to rely on the wife's own case as presented to the court by her on the footing that her evidence was accepted by the trial judge, including the statement in which she disclosed her adultery. Her adultery is relevant on the question of maintenance, for, indeed, she has forfeited her common law right to be maintained. There is a decision of Lord Merriman P. in *Alhadeff* v. *Alhadeff* [10] which emphasizes, if it be necessary, that the adultery of a wife, who has obtained a decree of divorce in the exercise of discretion of the court, is a relevant matter in considering her conduct. The judge did take her adultery into account, but, as I understand his judgment, came to the conclusion that, having regard to the circumstances in which it occurred, following upon the husband's long continued association with the woman (his present wife) with whom he committed adultery, notwithstanding his real wife's protests, bearing also in mind that the adultery of the wife had long since ceased, he need not make in this case any material reduction from the maintenance of the wife because of her adultery. This conclusion was one which, in the exercise of his discretion, the judge was fully entitled to

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[8] [1948] P. 62; 63 T.L.R. 647; [1947] 2 All E.R. 713.

[9] [1951] P. 101; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784.

[10] [1951] W.N. 367.

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reach. Moreover, I agree with him that the delay on the part of the wife in disclosing the fact that she was in due course going to admit adultery has not any bearing on the case. She did at the hearing disclose her adultery and the discretion of the court was exercised in her favour.

I agree also with the trial judge who found, contrary to the opinion of the registrar, that the fact that the wife made a charge of cruelty for the first time in a supplemental petition and dropped the charge when the petition was no longer defended, was irrelevant and did not show any insincerity or relevant misconduct on her part. On a defended case, in which each side was plainly guilty of adultery, she may well have been advised to allege cruelty as a counterblast to the defence raised against her in order to try and tip the scales in her favour.

I come now to the form of the order. The effect of the order to pay £5 10s. a week free of tax is to subject the husband to a gross liability of £10 a week at the rate of tax in force at the date of the order, and £9 11s. 3d. at the rate now in force. The wife was entitled to recover the appropriate relief from the Commissioners of Inland Revenue, whether the husband had paid the tax or not. This is shown by the cases of *Spilsbury* v. *Spofforth* [11] and *Stokes* v. *Bennett*.[12] The judge was, I think, not conscious of this and thought that the husband, if given the opportunity, would deduct tax which he had never paid and so defeat the wife who would, for this reason, be unable to make a claim to relief in respect of his deductions. He referred to the maintenance of the children order in his judgment in these words: "The "figure of £100 for the maintenance of the children is the "approximate sum he in fact pays, as he deducts from the sums "ordered by the court tax at the standard rate—though on his "own account of his income he himself pays no tax, and the "wife thus cannot recover what he deducts from the revenue "authorities."

The judge referred to the fact that his order was to be effective as from September 1, 1954, the date when the wife's salary ceased, and so would create arrears. He continued [13]: "After having since September, 1952, paid nothing for this "wife's maintenance, the husband from November 30, 1954, to "date has paid £26 17s. 6d. in all. So the arrears from "September 1, 1954, to March 21, 1955, will amount to some

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[11] (1937) 21 T.C. 247; [1937] 4 All E.R. 487.

[12] [1953] Ch. 566; [1953] 2 All E.R. 313.

[13] Ante, p. 235.

" £160, which I consider should be paid by monthly instalments " of £30 each." That is working out the maintenance at the rate of £5 10s. a week. Then he said: " The appeal of the wife is " accordingly allowed and the registrar's interim order is varied " by ordering maintenance at the rate of £5 10s. per week free of " tax from September 1, 1954, the first payment at the current " rate should be made on March 25, 1955. The arrears created " by this order are to be paid separately and in addition to the " £5 10s. per week as follows." He then gave instructions about payment and continued: " In order to pay £5 10s. per week, " obviously the husband need overdraw at no greater rate than " he has been doing and yet maintain an appropriate standard " of living." That passage ignores the fact that he would be required in addition to pay the tax to the revenue. Finally, the judge said[14]: " The reasons leading me to make the order ' free " ' of tax ' need, in the circumstances, no amplification. Indeed, " I do not imagine that the order in favour of the children would " have been in its present form had it been realized at the time " that the husband would seek so to interpret it that he would " deduct tax that he had never paid. The result of his so doing " is in effect to prevent the wife from obtaining the sum which " the court intended her to have for the maintenance of the " children."

The passages that I have read indicate clearly that the judge intended to see, if he could, that £5 10s. a week reached the wife in cash, free of any deduction; not that she should receive £5 10s. a week, plus income tax relief on the tax deducted. He was, I think, striving to do that which Lord Merrivale P. had endeavoured to do in *Dayrell-Steyning* v. *Dayrell-Steyning*,[15] namely, to divide up the income of the parties in arithmetically fair shares after providing for taxation. This feat is now recognized to be impossible, and the best that can be done is, in comparable cases, to make a gross order which, in the known circumstances at the current rate of tax, will give the wife a figure approximating to that which the court intends her to receive when her allowances are taken into account. Merely using the words " free of tax " attached to a net figure, or " less tax " attached to a gross figure, has no material effect, since the result in each case is to order a gross sum of which part must be paid to the payee and part to the revenue. In this case, the appropriate weekly figure, on the facts as at present known, on the footing that the wife is not now earning anything, would be in the neighbourhood of £7. In my opinion, therefore, the figure of £5 10s. free of tax should be deleted, and the figure of £7 less tax should be inserted in its place. On an order in this form, the husband will be entitled, if not bound, to deduct tax at the standard rate, and, in doing so, will be liable to the revenue accordingly, and the wife will be entitled to make such claim for income tax rebate as is appropriate having regard to her own relevant means and circumstances.

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[14] Ante, p. 235.

[15] [1922] P. 280; 38 T.L.R. 898.

EVERSHED M.R. I agree entirely with the judgment delivered by Hodson L.J. I am satisfied, for my own part, that the judge by his order intended that the wife should receive from the husband £5 10s. per week; no less, but no more. As my brother has pointed out, in the circumstances as we understand them to be, she will be able, by making appropriate application to the Inland Revenue, to increase the £5 10s. appreciably. In these matters, it must always be for the court a question of approximation and calculation to some extent, doing the best it can to reach the result intended; and, applying these tests, I agree that the correct figure to be put into the order should be £7 per week gross, a figure which, so far as can reasonably be foretold, should produce for the wife, when all is done, the intended £5 10s. a week clear. The result will, of course, be to reduce the liability of the husband under the order from what was originally £10, and is now a somewhat less sum, to the figure of £7, and to reduce also proportionately the figure for arrears.

As will be inherent in what I have already said, I think that the judge in this matter, which was one of discretion, in no matter of principle or other material respect erred so as to justify or entitle this court in interfering with his order. On the contrary, I think that he correctly proceeded to build his conclusion upon the basis of considering what were the "faculties" of the husband, using that word in the sense in which it was used in the Ecclesiastical Courts, as stated by Lord Merrivale P. in *N.* v. *N.*,[16] cited by Sachs J., particularly this passage of the judgment[17]: "The Ecclesiastical Courts showed a degree of practical "wisdom. . . . They were not misled by appearances . . . they "looked at the realities. . . . The court not only ascertained "what moneys the husband had, but what moneys he could have "if he liked, and the term 'faculties' describes the capacity and

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[16] 44 T.L.R. 324, 327.

[17] Ante, p. 231.

"ability of the respondent to provide maintenance." Here, then, the judge looked for and discovered, as best he could, what were the relevant expendable resources for the husband at the material (that is, the present) time. He found him a man whose capabilities ranked him among the class called "£3,000 a year "men," he found that he was not now earning that sum or any appreciable sum in the way of income, but was living according to a standard appropriate to one having available not less than £1,200 per annum as free income after tax had been paid.

In that connexion, I agree with Mr. Beyfus that it would not be right to treat the sum of £240 payable by the husband in respect of his children under orders of the court as though it were part of his notional income, though the fact that that order has been made, and the fact that the husband's arrangements with the bank appear to permit him to discharge it, are relevant facts to be taken into account; but I think the view I have taken of the faculties of the husband were those which the judge took and, as I have already said, I think in other respects the judge correctly applied the law and the relevant principles.

For these reasons, I agree that, to the extent my brother has indicated, the order made by Sachs J. should be varied.

I should add that I share the view expressed by the judge and my brother in regretting the length of time that the matter took before the registrar and before the judge; but that expenditure of time was in no small measure, as I think, due to the failure of the husband to make, as ordered, a proper affidavit of documents, and the expenditure (though regrettable) does not appear to me, therefore, to be a matter of which the husband can now complain.

PARKER L.J. I entirely agree with both judgments.

Order varied.

Solicitors: *Wedlake, Letts & Birds for the husband; Herbert Oppenheimer, Nathan & Vandyk for the wife.*

B. A. B.

KNOTT *v.* KNOTT.

Winchester Assizes.

1955
March 28, 29, 30.

Sachs J.

Husband and Wife — Divorce — Cruelty — Denial to wife of child — Husband's insistence on coitus interruptus.

A husband's deliberate refusal to allow his wife a child, while preserving to himself a measure of sexual enjoyment, may amount to cruelty.

A husband insisted on coitus interruptus and other incomplete sexual acts against his wife's wish over a period of many years, and refused to let her have the child she greatly desired. She would not accept his suggestion that contraceptives might be used because she was not prepared to barter her desire for a child against her own immediate sexual gratification. In the resulting disputes he would reduce her to tears by his attitude, and her health was affected: —

Held, that such conduct amounted in the circumstances to cruelty.

WIFE'S DEFENDED PETITION for divorce.

The following statement of facts is summarized from the judgment: The parties were married on December 26, 1942; the husband was at the time 22 years of age and the wife was a healthy girl not quite 17. The husband, who was in the Army, spent his leaves at the home of the wife's parents, where the parties had a bedroom and shared in the other accommodation of the house. In June, 1944, the husband went to Normandy and was taken prisoner of war in July, 1944. In April, 1945, he was released and returned home. In August of that year the wife was taken ill with tuberculosis and spent some eight months in hospital, returning to the matrimonial home, which was still that of her parents, in May, 1946. The parties continued to cohabit until March, 1953, when the husband left the home and the wife refused to follow him. Shortly afterwards she filed a petition praying for the dissolution of the marriage on the ground of cruelty.

By her petition the wife alleged that the husband throughout the marriage would not have normal and full sexual intercourse, that throughout the marriage he practised coitus interruptus against her will, and that he would not let her have a child. It was further alleged that the husband acted provokingly and aggressively in the quarrels between them in his criticisms of his wife. Other allegations included meanness, and the fact that the husband was not willing to make a home for himself and his wife "on their own."

The husband's case was that coitus interruptus only took place after December, 1946, and that the reason for the practice at that time was that he considered it unwise to have children in view of the wife's state of health and the question of tuberculosis. He alleged that the quarrels and difficulties arose substantially because there was no privacy in the house of the wife's parents, and that the household was in fact dominated by the wife's mother. He attributed the wife's symptoms of ill-health to the aftermath of tuberculosis.

The evidence showed that when the parties separated the wife's health had been affected: she was prone to nightmares, and palpitations, and her state was sufficiently serious for her almost to be carried about; she could not walk properly, her hands were shaking, and she had many other symptoms of nervous trouble.

Conrad Oldham and *Deirdre McKinney* for the wife.
Leslie Brooks for the husband.

SACHS J. stated the facts substantially as set out above, and said that he had no doubt that the wife had been terribly unhappy, and that by the time her husband left her she had no wish to live with him either at her parents' home or elsewhere. That state of affairs she attributed to the husband's cruelty as alleged in her petition. His Lordship said that the wife was a witness of truth, exhibiting a high degree of accuracy, and convincing in her evidence to that degree which was required when the standard of proof was that laid down in *Galler* v. *Galler*.[1] So far as the evidence of the husband was concerned, wherever there was a conflict on an issue of facts between the wife on the one hand and the husband on the other, or between the mother-in-law and the husband, he (his Lordship) rejected the husband's evidence in every case.

His Lordship continued: So definite was the impression of unreliability in the end that I am not prepared to accept the husband's assurances as to what were his motives regarding the matters of complaint. I am inclined to think that they stemmed to some extent from his insensitiveness to his wife's health and his wife's happiness. I think that he was both careless and reckless as to her wishes and welfare. He was a man who could and did determinedly and vocally insist on his views if those views happened to be in conflict with those of others.

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[1] [1954] P. 252; [1954] 1 All E.R. 536.

With that background I propose to turn to the allegations of cruelty themselves. First of all, I am going to deal with the allegations of meanness. I accept the wife's evidence on those allegations, and I accept that the husband was far from generous, but nothing that the wife said established cruelty itself, or anything which could be fairly taken into account as being an ingredient in what Lord Tucker in *Jamieson* v. *Jamieson*[2] described as the "aggregate" offence of cruelty. Nor am I disposed to regard as a constituent in the matter of cruelty the fact that the husband would not form a home for the wife when she returned from hospital.

Next, I turn to examine the sexual allegations, and I will then deal with the question of the oppressive quarrels, though when I deal with these matters in compartments it must not be thought that I am not in the end going to deal with the issue as a whole. The inherent characteristics of the wife, who was very sensitive to atmosphere, and of a worrying type, have to be taken in conjunction with the fact that she was what the doctors call "emotional." That is, according to the medical evidence, she was a woman who was liable to have her nervous system affected by events, and to be more affected by them than would others by the same events. I do not understand that to mean "emotional" in the sense that she would give strident effect to her emotions in a hysterical way. She was a young woman whom I regarded as submissive, one who would rather submit than risk a quarrel—as appeared in a relatively minor way when the question arose whether she should or should not sit in the sun, when the sun would be congenial to the husband but harmful to her.

I have to consider the sexual matters not only in the light of the necessity of the proof of any charge having to conform to the standard laid down in *Galler* v. *Galler*,[3] but also in the light of the fact that one has to act with special care in matters of marital intimacies as to which corroboration can hardly be expected. The husband, as I have said, was a man who was insensitive to the feelings of his wife to the point of recklessness: and a man who neither liked nor wanted children. It was, I think, at the very outset of their married life, at a stage when the young wife knew very little about sexual matters, that he first

[2] [1952] A.C. 525, 551; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[3] [1954] P. 252.

carried out this practice of coitus interruptus. I accept the wife's evidence that she never had full sexual intercourse with him, and that there were occasions when he would satisfy himself between her thighs. The state of affairs throughout their married life was that the husband could and, in fact, did satisfy himself, and then left his wife unsatisfied and frustrated. Against this state of affairs the wife protested.

The husband, in his cross-examination, varied the degree of his denial. He started off by saying that there was, to use his own words, "no big disagreement." Later on he agreed that there were protests; but whatever variation there was, I accept the wife's evidence that the husband, being the more overpowering character, insisted on his will being followed, that there were protests by the wife because she wanted a child, and that that led to quarrels, to which I will later refer. How deep the rift between them was, and how deep was the desire of the wife for a child, is, to my mind, exemplified by the fact that when the husband suggested that he should use contraceptives the wife rejected his proposal because she genuinely desired a child, and was not prepared to barter her want of a child for her own immediate sexual gratification. His suggestion was made when the coitus interruptus took place against, as he knew, the wife's will.

I am quite unable to accept the husband's evidence that there was a period of rest from sexual intercourse as a result of medical advice. Similarly, I reject his evidence that the reason for the coitus interruptus after 1946 was that he had fears on account of his wife having had tuberculosis, and that it was not proper to have children for that reason. I think that by the time he got to court he had persuaded himself that that was the fact; but, in truth, it was merely another manifestation of his desire not to have children. I make that clear at this stage because I have come to the conclusion, as I will later explain, that there was no good reason for this coitus interruptus with an unwilling wife. The husband knew of his wife's opposition to it, and, in my view, on the medical evidence, it had a definite and harmful effect on the wife's health; indeed, I should have thought this was inevitable with any woman, and particularly so with this woman.

It is true that the wife herself did not realize that it was coitus interruptus which was affecting her health: she attributed it to the quarrels relating to the frustration of her maternal instincts, and there is not the slightest doubt that these quarrels had their effect on her health. The quarrels, which were frequent, related to sexual intercourse and to not having a family: although there were other matters, there is no doubt it was the not having a family that was the main cause of the quarrels which affected her. The course of these quarrels, which made her, as she said, terribly unhappy, was described by her as one long attempt to get her "under his thumb," and that is what "got her down." She referred to the fact that sometimes he would go for a week without speaking after a quarrel. On other occasions he would go on and on, perhaps for an hour or so, or longer, and at the end she would break down and cry.

When I put to her certain questions after she had been re-examined, it appeared that she cried very often after these quarrels, and that, to her mind, he appeared to delight in carrying quarrels to that stage, and would then look at her with a sort of smile at the end of the quarrel when she broke out crying. It is quite clear from that, that time and again he was prepared to press his point to the stage when he knew she would cry, and, having regard to her general state of health, it is also clear that it was quite improper for him to press her to that stage. It was "unbearable" or "inexcusable": cf. *King* v. *King*.[4] He knew the state of her health, and yet he was prepared to ride roughshod over her; and I accept her evidence that he said to her that which most men would regard as a cruel thing to say—that he did not want her, and had no use for her.

This husband, to my mind, was a man disappointed in his wife. I think that he was disappointed that she had had this illness, disappointed that she had taken to glasses, disappointed with her lassitude, and that she was not so lively as she had been; and to that was the added irritation of being kept in a house where he no longer wanted to be. He vented on his wife his resentment at that disappointment and irritation in the form of quarrels with her, and to some extent (whether he realized it or not I am not sure) by denying her things, and by frustrating her maternal instinct.

As regards her health, it is right to say that I do not think that it is established that it was resistance lowered by the husband's pre-1945 actions which exposed her to tuberculosis. It is possible that it had some slight effect on that matter, but I am not prepared to hold that that was established. On the other hand, it is clear that, when the wife came out of hospital, she was in a state of arrested tuberculosis, and in that state any play upon her emotions, and any effect induced by her husband's coitus interruptus, or by her being denied a family, or by his pressing quarrels upon her, would have a bad result upon her, not only of itself in causing a nervous state, but, in addition, in lowering her resistance so as to induce a grave risk of further tuberculosis.

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[4] [1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584.

I am not prepared to accept the husband's evidence that he did not realize that his wife's health was deteriorating before his eyes. He could see that just as well as could his wife's mother, unless he deliberately shut his eyes, and I do not think he did that. He could not have failed to realize that this deterioration had as part of its origin these quarrels I have referred to—quarrels which came after sexual intercourse of a type which was not what she wanted, and quarrels which he had pressed to a point where she broke down and began to cry.

I turn to the law. As Mr. Oldham has pointed out to me, in *White* (*orse. Berry*) v. *White*[5] Willmer J. states that a husband must take his wife as he finds her. That axiom was later phrased in different words by Lord Tucker in that well-known passage in his judgment in *Jamieson* v. *Jamieson*,[6] referring to the need, in matters of cruelty, to consider, amongst other things, the state of affairs implicit in the physical or mental condition or susceptibilities of the innocent spouse. It is, accordingly, from that starting point that the rest of the matters have to be considered.

The position in relation to the law of cruelty of the linked problems of unreasonable refusal of sexual intercourse, the use of contraceptives against the will of one of the spouses, the practice of coitus interruptus where one spouse is unwilling, and the use, also against the will of one spouse, of other devices to avoid the procreation of children, is not free from difficulty.

As regards unreasonable refusal of sexual intercourse—this does not constitute desertion (*Weatherley* v. *Weatherley*[7]), but does constitute a grave and weighty ground constituting sufficient cause for one spouse to leave another (*Synge* v. *Synge*[8]).

As regards the use of contraceptives against the will of one of the spouses—this does not prevent the marriage from having been consummated (*Baxter* v. *Baxter*[9]), and does not, where the husband is the unwilling spouse, constitute cruelty, even if it injures his health, unless there is express intent by the wife to cause him misery: see *Fowler* v. *Fowler*,[10] and the range of differences between the position of an unwilling husband and an unwilling wife mentioned by Denning L.J. In *Baxter* v. *Baxter*[11] it is, however, indicated in the speech of Viscount Jowitt L.C. that the use of contraceptives might in certain circumstances form a link in the chain for some other claim for relief, a statement which has been interpreted in later decisions as including reference to charges of cruelty. In *Bravery* v. *Bravery*[12] all three judges of the Court of Appeal were of opinion that, as against a wife, it would be a cruel act for a husband to submit himself to sterilization without good medical reasons, unless the wife were a consenting party.

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[5] [1948] P. 330, 340; 64 T.L.R. 332; [1948] 2 All E.R. 151.

[6] [1952] A.C. 525, 550.

[7] [1947] A.C. 628; 63 T.L.R. 209; [1947] 1 All E.R. 563.

[8] [1900] P. 180; 16 T.L.R. 388; [1901] P. 317; 17 T.L.R. 718.

[9] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.

As regards coitus interruptus—there are three cases, *White* (*orse. Berry*) v. *White*,[13] *Walsham* v. *Walsham*[14] and *Cackett* (*orse. Trice*) v. *Cackett*,[15] in which this was held to be cruelty, where practised upon an unwilling wife in face of protests to the husband, who had in each case been warned by a doctor of the potential ill effect upon the wife.

In the present case no warning of the likely effects of what he was doing was given to the husband by the doctor, and in substance the wife's protests as regards coitus interruptus really related to the fact that she was thus prevented from having children. It was urged by Mr. Brooks that even if the husband's actions were the cause of detriment to his wife's health (and so I have held them to be) the husband did not know that this was due to coitus interruptus, or to his refusal to let his wife have a child; but having earlier indicated that I reject the husband's evidence as to the wife's deterioration in health not being apparent to him, I take the view that he was quite well aware that this deterioration was taking place and that it was in part caused by the quarrels and by the wife not being allowed to have children, and to that extent stemmed from his persistence in coitus interruptus.

I am not prepared to hold that his wife's deterioration in health was due to an active intent to injure her. I do hold that in his determination to continue with coitus interruptus and to refuse to let the wife have children he was "reckless" of the effect upon his wife and that his conduct in that respect was "inexcusable"—to use adjectives adopted by Lord Normand in *King* v. *King*.[16] And I hold that this determination to some degree stemmed from his disappointment in his wife which he thus vented upon her.

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[10] [1952] 2 T.L.R. 143.

[11] [1948] A.C. 274, 290.

[12] [1954] 1 W.L.R. 1169; [1954] 3 All E.R. 59.

[13] [1948] P. 330.

[14] [1949] P. 350; [1949] 1 All E.R. 774.

[15] [1950] P. 253; 66 T.L.R. (Pt. 1) 723; [1950] 1 All E.R. 677.

If, as appears to be the case, the point is free from authority in the sense that I am entitled to form my own opinion in the same way as a jury would of what conduct (to adopt the words of Hodson J. (as he then was) in *Cackett* (*orse. Trice*) v. *Cackett*[17]) can properly be described by the English word "cruel," in its ordinary meaning, I would hold that for a man deliberately and without good reason permanently to deny to a wife with a normally developed maternal instinct a fair opportunity of having even a single child is of itself cruelty when injury to her health results—at any rate where the husband adopts a course which preserves to himself a measure of sexual enjoyment. My view is based on the simple ground that such a refusal is a deliberate act contrary to the law of nature, and one which the husband must realize is likely to have a harmful effect upon his wife's health: and that thus permanent and unreasonable starvation of the maternal instinct may of itself be a cruel thing. Neither counsel, after due research, have been able to cite any authority in point, and thus nothing in the books seems to preclude my arriving at this conclusion. Indeed, I feel fortified in the above conclusion in that *Bravery* v. *Bravery*[18] appears to show that, even where both parties may obtain apparent physical satisfaction, yet, so far as the woman is concerned, the permanent deprivation against her will of the opportunity of having children must have been the point leading to the court's unanimous expression of opinion on the issue I have above referred to.

In the present case the refusal to allow the wife to have a child had been persisting for so many years that it had all the essential ingredients of permanence: in addition, it was unreasonable and resulted in injury to the wife's health. Thus the refusal, of itself, constituted cruelty—there being nothing in the recent authorities (to which I will later refer) on "intent" which precludes my so holding.

A fortiori, I consider it to be cruelty where such a refusal is, as here, accompanied by a persistent adoption of a non-natural form of intercourse, e.g., coitus interruptus, when the wife is unwilling. There is then an added element, a serious one, that injury to the wife's health results from the very practice itself —an injury which may be distinct from that caused by starvation of the maternal instinct. Indeed, it is injurious to health in a more direct manner than any method of sexual relationship which allows the wife to have all satisfaction short of satisfaction of the maternal instinct.

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[16] [1953] A.C. 124, 129–130.

[17] [1950] P. 253.

[18] [1954] 1 W.L.R. 1169.

It is true that the three above cited authorities on coitus interruptus are all cases in which the husband had been affirmatively warned by the doctors of the potential results of that practice—but that affirmative warning made it unnecessary for the judges concerned to consider whether knowledge of potential injury to health could not be imputed from other sources, or to consider the separate question of how far the nature of the act was one which was or was not cruel apart from deliberate intent to inflict misery. It is with that in mind that I look at the reference of Willmer J. to " cold calculated cruelty " in *White* (*orse. Berry*) v. *White*,[19] and to Wallington J.'s judgment in *Walsham* v. *Walsham*,[20] where he said: " Some women, how-" ever, may be so constituted that their health is not affected by " repeated partial intercourse, such as coitus interruptus, while " other women—perhaps of a more normal constitution and out-" look—enter into the marriage state hoping to fulfil the main " function, or at least one of the most important functions of " matrimony, viz., the bearing of children. When the latter class " of women are denied the normal means of child bearing and " their sexual functions are abused by frequent coitus interruptus, " especially when it follows substantial periods of complete denial " of intercourse, their health (both bodily and mental) is likely to " be affected. In my opinion the present case falls within the " latter category. I am quite satisfied by the wife's evidence " that the husband's conduct was such as he was determined to " follow, and in fact followed, regardless of what he knew would " be the injurious consequences and regardless, also, of her " repeated protests and requests that intercourse should be normal " and proper. He has, therefore, been guilty of cruelty within " the accepted definition of that expression as applied to cases of " alleged cruelty in these courts."

On the question of intent, I have been referred to the recent cases of *Cooper* v. *Cooper (No. 1)* [21] and *Ivens* v. *Ivens*,[22] and also to *Lang* v. *Lang*.[23] In *Cooper* v. *Cooper* [24] Karminski J., delivering the first judgment at the request of Lord Merriman P., said [25] (referring to Lord Normand's opinion in *Jamieson* v. *Jamieson* [26]): "the actual intention is . . . a circumstance of peculiar import-"ance because that which is intended hurts more; but as I "understand his reasoning, conduct which is the consequence of "mere obtuseness or indifference may none the less be cruelty." He then refers with approval to Shearman J.'s statement in *Hadden* v. *Hadden* [27]: "I do not question . . . that he had no "intention of being cruel . . . but . . . his intentional acts "amounted to cruelty." And, finally,[28] one comes to Karminski J.'s statement of the facts of the case before him, and the way in which he put upon the husband the responsibility for the natural and probable consequences of his acts.

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[19] [1948] P. 330, 340.

[20] [1949] P. 350, 352.

Further, in *Bravery* v. *Bravery*,[29] Denning L.J., referring to the act of sterilization, said [30]: "It was indeed aimed at her, "because it was done so as to prevent her from having another "child. It was likely to injure her health, and did in fact do so."

In this state of the law there is, as I have previously stated, nothing to preclude my holding that the course of conduct pursued by the husband in the present case in relation to sexual matters was "cruel." In my view it did constitute cruelty, and that of itself would entitle the wife to a decree.

As, however, one ought not to compartment one's examination of allegations in relation to what has been pointed out in the House of Lords to be a single charge of cruelty, I now turn to the quarrels, and the question of their effect on the wife's health. Although the evidence was not as extensive as perhaps it might have been if it were the sole charge against the husband, yet such evidence as was in fact given was given, to my mind, in a particularly convincing manner. It established that the husband's method of conducting an argument (in which he was, incidentally, in the wrong) was one which resolved itself into putting undue pressure on the wife. It was a method which the husband clearly realized would result in the wife breaking down and crying, and would be thus bound to add to the stress under which she was labouring. He also knew quite well that she must not be subjected to stress in her particular state of health. In those circumstances this pressure seems to me to have been "inexcus-"able" or "unpardonable" (again to use words which appear in *King* v. *King*[31]) and so to have been a cruel form of conduct. It had, in fact, had results to which I have referred. This was something, to my mind, that in the particular circumstances of this case was different from the ordinary run of domestic quarrels.

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[21] [1955] P. 99; [1954] 3 All E.R. 415.

[22] [1955] P. 129; [1954] 3 All E.R. 446.

[23] [1955] A.C. 402; [1954] 3 All E.R. 571.

[24] [1955] P. 99.

[25] Ibid. 118.

[26] [1952] A.C. 525, 534.

[27] The Times, December 5, 1919, p. 5, col. 3.

[28] [1955] P. 99, 122.

[29] [1954] 1 W.L.R. 1169.

[30] Ibid. 1179.

Having considered both aspects of the case separately, the proper course is to take them in the aggregate, and to look at the picture as a whole. Doing so, one finds that here is a case where there was a wife who needed rather more than the usual consideration, but the conduct of the husband was such that it pressed hard upon her, and had results which were visible to him as time passed. He, nevertheless, persisted in that conduct, and in my view, the two aspects taken in the aggregate no less than taken separately, came to amount to cruelty in the common use of that word.

Decree nisi.

Solicitors: *G. A. Mooring Aldridge & Brownlee, Bournemouth; D'Angibau & Malim, Bournemouth, for Rothera, Sons & Langham, Nottingham.*

J. B. G.

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[31] [1953] A.C. 124.

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July 11, 12.

Evershed M.R.,
Jenkins and
Parker L.JJ.

WESTERN STEAMSHIP COMPANY LD. v. N.V. KONINKLIJKE ROTTERDAMSCHE LLOYD AND OTHERS.

THE EMPIRE JAMAICA.

Shipping—Limitation of liability—Fault or privity—Vessel manned with insufficient number of certificated officers—Collision occurring during watch of uncertificated officer—Actual fault or privity of owners—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503 *—Hong Kong Merchant Shipping (Amendment) Ordinance, No.* 2 *of* 1949.
Causation.

Where a collision occurred as a result of the improper navigation of an uncertificated officer in charge of the bridge of a vessel which, to the knowledge of the owners, was manned with an insufficient number of certificated officers in breach of section 4 (3) (*c*) of the Hong Kong Merchant Shipping (Amendment) Ordinance, No. 2 of 1949, requiring the vessel to carry a specified number of certificated officers, it was sufficient for the purposes of proving that the collision occurred without their actual fault or privity, within the meaning of section 503 (1) of the Merchant Shipping Act, 1894, for the owners to show that they had good reason to believe that the uncertificated officer concerned was fully competent to perform the duties for which he was engaged.

Decision of Willmer J., ante, p. 52; [1955] 1 All E.R. 452 affirmed.

APPEAL from Willmer J.[1]

The plaintiffs, the owners of the *Empire Jamaica*, sought a decree of limitation of liability in respect of damage arising out of a collision which occurred on September 1, 1951, in the Java Sea, between their vessel and the first-named defendants' vessel *Garoet*. The first-named defendants denied that the plaintiffs were entitled to a decree on the ground that they had failed to prove that the collision and consequent damage occurred without their actual fault or privity. The first-named defendants contended that the plaintiffs had failed to discharge the onus of proof in that they had neglected to supply their vessel with a sufficient number of certificated officers in accordance with the Hong Kong Merchant Shipping (Amendment) Ordinance, No. 2 of 1949, thus rendering their vessel unseaworthy.

Willmer J. held that, having regard to the evidence of the officer's competence, the plaintiffs could not be held guilty of fault or privity in relation to the improper navigation of their vessel within the meaning of section 503 (1) of the Merchant Shipping Act, 1894, and accordingly were entitled to limit their liability, notwithstanding the fact that the vessel was manned with an insufficient number of certificated officers in breach of the Hong Kong Merchant Shipping (Amendment) Ordinance, No. 2 of 1949, and the officer in charge of the bridge at the time of the collision was not certificated, for it was impossible to say that there was any causal connexion between the fact of the officer not having a certificate and his improper navigation which led to the collision.

The first-named defendants appealed.

R. F. Hayward Q.C. and *D. H. Hene* for the first-named defendants. A person seeking to limit his liability under section 503 of the Merchant Shipping Act, 1894, must show that the damage arose without his actual fault or privity. Here the judge found the fault of undermanning proved, but that there was no connexion between the fault and the damage. The damage arose from the improper navigation of the officer in charge of the bridge of the *Empire Jamaica*, who was an uncertificated officer. In breach of the Hong Kong Merchant Shipping (Amendment) Ordinance, No. 2 of 1949, this vessel, to the knowledge of the owners, carried only one certificated officer other than the master. The plaintiffs in breach of the law now seek to use the law to saddle the innocent party with the result of their negligence. There is a heavy onus on the plaintiffs to show that this breach did not contribute, and they have not discharged that onus. The evidence shows that this uncertificated officer at the material time broke all the relevant Collision Regulations in a manner which it is difficult to visualize a certificated officer doing. These faults are substantiated by the preliminary act and statement of claim of the plaintiffs in the original collision action. The preliminary act is a solemn admission from which the plaintiffs cannot depart: *The Seacombe and The Devonshire* [2] and *The Lady Belle*.[3] The judge was wrong in concluding that the defendants did not challenge Sinon's competence. This point was put to the master, the only oral witness called. Sinon was the plaintiffs' servant and it was for them to prove his competence, which was not pleaded, and not for the defendants to plead his incompetence. The plaintiffs have failed to discharge the onus of proving Sinon competent.

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[1] Ante, p. 52; [1955] 1 All E.R. 452; [1955] 1 Lloyd's Rep. 50.

[PARKER L.J. Do you concede that if Sinon was as competent as if he had held a certificate the fault here did not cause or contribute to the collision?]

Yes, but here the evidence proves Sinon's incompetence, and it is submitted that the judge came to a wrong conclusion in deciding that the plaintiffs had satisfied the burden of proof.

Hene following. The judge misdirected himself as to the burden of proof, and the evidence disclosed adequate causal connexion between the faulty manning and the collision. There is a heavy burden on the party seeking the benefit of section 503 of the Merchant Shipping Act, 1894: *Standard Oil Co. of New York* v. *Clan Line Steamers Ld.*,[4] *per* Viscount Haldane; *Paterson Steamships Ld.* v. *Canadian Co-operative Wheat Producers*

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[2] [1912] P. 21; 28 T.L.R. 107.

[3] [1933] P. 275; 49 T.L.R. 595.

[4] [1924] A.C. 100, 113; 40 T.L.R. 148, 151.

Ld.,[5] *per* Lord Wright. An unseaworthy and improperly manned ship raises a presumption of fault, and the plaintiffs by a reply should have raised the point of Sinon's competency. The evidence discloses no adequate reason for Leung Yew being satisfied that Sinon was competent. The judge concluded that the competency of Sinon was not challenged, but it is submitted that, prima facie, this is in issue on establishing that Sinon had no certificate. With regard to the question of causal connexion, in *The Bristol City*[6] the onus was on the plaintiffs to show that they did not know of the vessel being improperly equipped, and here also the onus is on the plaintiffs to show that they did not know that this vessel was improperly manned. *The Charles Livingston*,[7] on which the plaintiffs relied, is distinguishable on the grounds that the man in charge was a priori competent as he had a pilot's certificate, and that his career was found not to be such as to warrant a finding that he was incompetent. The emergency provision in subsection (19A) of the Merchant Shipping Ordinance was available to the plaintiffs to overcome the shortage of certificated officers, whilst still complying with the law. The provisions as to limitation of liability are meant to assist claimants who have acted reasonably and complied with the law. The plaintiffs have not discharged the onus of proof; this is a case where this court is in as good a position as the judge to come to a conclusion on the evidence: *Benmax* v. *Austin Motor Co. Ld.*[8]

[*The Mobile*[9] and *Beauchamp* v. *Turrell*[10] were also referred to.]

K. S. Carpmael Q.C. and *J. B. Hewson* for the plaintiffs. Admittedly the regulations were designed to secure the competence of officers, but the possession of the highest certificate does not prevent breaches of the Collision Regulations. Experience at sea as well as the fact of having a certificate is evidence of competence. The evidence here, which was similar to that in *The Charles Livingston*,[11] discharged the onus of proving that the master's opinion was justified. The managing director was entitled to rely on the master's opinion of Sinon, and it is clear both took all possible steps to secure an adequate crew. The evidence of the Director of Marine at Hong Kong shows that exemption from compliance with the Ordinance of 1949 would have been granted in the normal way, and thus there was only a technical fault on the part of the plaintiffs. It is accepted that the onus of showing that Sinon was competent is upon the plaintiffs.

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[5] [1934] A.C. 538, 550; 51 T.L.R. 5, 9.

[6] [1921] P. 444; 37 T.L.R. 901.

[7] (1941) 69 Ll.L.R. 180.

[8] [1955] A.C. 370; [1955] 1 All E.R. 326.

[9] (1856) Swab. 69.

[10] [1952] 2 Q.B. 207; [1952] 1 T.L.R. 695; [1952] 1 All E.R. 719; [1952] 1 Lloyd's Rep. 266.

[11] (1941) 69 Ll.L.R. 180.

[PARKER L.J. Do you have to prove that Sinon was as competent as a certificated officer or only that the owners had every reason to believe that he was as competent as a certificated man?]

The owners must take reasonable steps to see that their officers are competent and must bring themselves within the section. Here the officer was a man of eight years' watch-keeping experience and this casual act of negligence is the only instance of improper navigation on his part. The evidence shows that Sinon was competent and, accordingly, his not holding a certificate and the breach of the statutory requirement are of no consequence. It is always necessary to prove damage caused by the breach of a regulation as well as the breach, and to prove only a breach of a statute does not conclude the matter: *L.P.T.B.* v. *Upson*,[12] *per* Lord Wright. Here the question is whether the breach of the statute had anything to do with the accident. It is submitted that the collision occurred from a casual act of negligence on the part of Sinon and that there was no causal connexion between the breach of the statutory requirement and the collision. A shipowner is under a duty to see that his vessel is properly manned. In a large company this is delegated to a marine superintendent, but here the managing director was entitled to rely on the opinion of the experienced master. The judge was satisfied that there was no fault in allowing Sinon to sail in the capacity for which he was engaged. This appeal involves a question of fact, and the judge rightly found there was no causal connexion between the breach of the statutory requirement and the collision. It is evident that the Marine Department at Hong Kong was satisfied that Sinon was competent for the position, and that fact, coupled with the evidence of the master, goes a long way to discharging the onus on the plaintiffs. The appeal should be dismissed.

Hewson following. It is significant that section 92 of the Merchant Shipping Act, 1894, does not require, apart from the master, a second certificated officer for a home trade vessel, which would navigate in some of the most frequented waters in

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[12] [1949] A.C. 155, 171; [1949] 1 All E.R. 60, 69.

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the world. Here the lack of a certificate is only one factor of the evidence to be considered, and it is submitted that there is abundant evidence to show that Sinon was competent.

[Parker L.J. Do you have to serve for a specified period before obtaining a certificate?]

By the rules issued under the Merchant Shipping Act a person must have four years' experience before he can sit for a second officer's certificate. It is clear from the evidence that Sinon had this experience.

R. F. Hayward Q.C. replied.

Evershed M.R. At about twenty minutes past one in the morning of September 1, 1951, in the Java Sea, on a night which was dark, but clear, a collision occurred between the plaintiffs' vessel, the *Empire Jamaica*, and the defendants' vessel, the *Garoet*, as a result of which considerable damage was done to both vessels. The plaintiffs have admitted that the collision was solely due to the negligent navigation of their vessel, *Empire Jamaica*. I think that that fact must be stated, in view of the argument; for I agree with Mr. Hayward that it is not open in these proceedings for the plaintiffs to suggest that some part of the blame might have been due to the faulty navigation of the *Garoet*.

At the time of the collision the officer on watch in the *Empire Jamaica* was one Sinon, and the inference, which I think is inevitable from the materials and the admission made, is that Sinon committed a blunder in seamanship of what I think might reasonably be called a somewhat serious and startling character.

At the date in 1951 of which I am speaking there were in force in the port of Hong Kong, at which the *Empire Jamaica* was registered and from which she had sailed a little time before, certain regulations which formed part of the Merchant Shipping (Amendment) Ordinance, No. 2 of 1949. The provisions of those regulations were derived from section 92 of the Merchant Shipping Act, 1894, and they follow that section closely. Section 4 (3) of that Ordinance provided as follows: "Every British ship, and "every foreign ship holding a passenger certificate under section "10 shall, when leaving any port of the colony, be provided with "officers who possess certificates of competency of a grade "appropriate to their stations in the ship or of a higher grade, "according to the following scale:—(*a*) in any case, with a duly "certificated master; (*b*) if the ship is of 100 tons or upwards, "with at least one officer besides the master holding a certificate

" not lower than that of only mate, or of second mate in the case "of a sailing ship of not more than 200 tons; (c) if the ship " carries more than one mate, with at least the first and second " mates duly certificated. . . ."

The *Empire Jamaica* was a vessel of some 3,500 odd tons gross, and it follows, therefore, from paragraph (c) above, that, to comply with the Ordinance, not only must she have had a duly certificated master, but also, if there were more than one mate, a first and second mate duly certificated. In fact the complement of the ship was made up, so far as relevant, as follows; her master was one Beer, who was beyond question duly certificated as such, and she had in addition other officers, but only one other certificated mate. There was a third mate who was not certificated, and also there was the man I have mentioned, Sinon, who was signed on in the ship's articles with the rank or office of chief boatswain, but who in fact acted, for practical purposes (and it was intended that he should act), as second mate. He was not certificated.

If the facts were merely as I have stated them, the inference might reasonably be drawn that the absence in Sinon of the necessary qualification, which a certificate would have given, was responsible for the collision. In these proceedings, however, the plaintiffs have claimed under section 503 of the Merchant Shipping Act, 1894, to limit their liability to an amount as provided by the section, which, having regard to the tonnage, amounts in total to some £23,000. The relevant terms of that section are: " The owners of a ship, British or foreign, shall not, where all " or any of the following occurrences takes place without their " actual fault or privity; (that is to say) "—and then are set out certain occurrences including damage or loss to goods, merchandise and to other vessels—" be liable to damages beyond "—and then comes the relevant figure, which, since there was here no loss of life, is £8 for each ton of their ship's tonnage.

This case, therefore, raises the question whether, on the facts as they were ultimately proved in the proceedings, the plaintiffs have established that the damage which was suffered took place without the owners' actual fault or privity. As has been pointed out, the substance, putting it very briefly, of that limitation is to remove from the owners, in the circumstances stated, the full liability for the damage which otherwise, by the common law, would flow from the fact that there had been negligence by the owners' servant. The owners themselves must have been actually at fault or privy to the negligence, if they are to be liable for the full consequence of it.

In *Standard Oil Co. of New York* v. *Clan Line Steamers Ld.*,[1] in which the effect of this section was considered by the House of Lords, Lord Haldane said[2]: "It is now well settled that those "who plead the section as a defence must discharge the burden "of proving that they come within its terms. That is to say, "they must show that they were themselves in no way in fault "or privy to what occurred." That was a case in which it was held that the owners were not entitled to limit their liability because they had not taken care to see themselves (as they should have done) that the ship was properly seaworthy by instructing the master about the necessary risk which attached to the vessel's design. We were also referred to *The Bristol City*,[3] a case in this court, where a similar question arose because the ship was, amongst other things, not supplied with proper ground tackle. Atkin L.J. referred to the section and to certain language of Hamilton L.J. in *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.*,[4] and then summed the matter up in this way[5]: "In my "view, the onus is upon the plaintiffs to establish that they did "not know this vessel was not properly equipped, and I think it "is impossible to say that they have discharged that onus."

In the present case, the appellants, the defendants before Willmer J., by an adaptation of that language, say that the plaintiffs have failed to establish that they did not know and ought not to have known that the *Empire Jamaica* was not properly manned; and by the phrase "not properly manned" they refer primarily—indeed, exclusively—to the circumstances that this man, who was in charge of the navigation of the ship at the relevant time, had not got the requisite certificate, and that the ship had gone to sea in breach of the requirements of the Ordinance of 1949. If there were no more facts proved in the case than those that I have already stated, it would, I think, be difficult for the plaintiffs to say that they had discharged the onus; but there were other facts proved.

Before I refer to the evidence, I should state in connexion with the relevant regulations that there was also a provision in operation under the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951, whereby a subsection (19A) was added to the Merchant Shipping Ordinance, No. 10 of 1899, to the effect that the Governor of the Colony of Hong

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[1] [1924] A.C. 100; 40 T.L.R. 151.

[2] [1924] A.C. 100, 113.

[3] [1921] P. 444; 37 T.L.R. 901.

[4] [1914] 1 K.B. 419.

[5] [1921] P. 444, 453.

Kong in Council might, if he thought fit and upon such conditions as he thought fit to impose, exempt a ship from the specified requirements in the Ordinance which I have read. That right is expressed to be qualified by this, that the Governor must be "satisfied that that requirement has been substantially "complied with in the case of that ship, or that compliance "with the requirement is unnecessary in the circumstances "of the case, and that the action taken or provision made as "respects the subject matter of the requirement in the case "of the ship is as effective, as or more effective than actual "compliance with the requirement." In point of fact, as also appears from the record, an exemption of this ship under that paragraph was later granted by the Governor in respect of the regulations that I have mentioned, the terms of which I need not pursue; but it is also a point made by the defendants that the owners of this vessel had not, in the circumstances which I will mention in a moment, then availed themselves, as they should have done, of the capacity to obtain the dispensation in appropriate circumstances.

The circumstances to which I have just alluded are these, and I now come to the evidence. I think it quite plain that at this time there was a very substantial and serious shortage of certificated officers in the merchant marine, at any rate in this part of the world; and, in those circumstances, it is no doubt true that a shipowner in the ordinary course would have to do the best he could. But, reverting to the point which is made on the defendants' side, what is said here is that, not only were the plaintiffs, by their managing director, well aware of the regulation—and not only were they well aware of the difficulty of obtaining certificated officers, but they forbore from making the application they might and should have made under the paragraph. I think that those circumstances have a relevance to the question of fact which we have to consider. But, as Willmer J. observed, it is no less plain that the mere fact that the collision took place because of the negligence of Sinon and the mere fact that Sinon was not certificated does not provide the answer to the present case. Equally, I think, it follows that the mere fact that there had been a breach of these regulations, and the fact that the plaintiffs had not tried to avail themselves of the dispensing provision is not an answer to the problem; nor are these circumstances in combination an answer to the problem.

If the plaintiffs are to establish exemption from liability, save to the extent provided by section 503, they have to prove that the damage or occurrence took place without their actual fault or privity; but, in my judgment, they can establish that fact if they prove to the satisfaction of the court that, in all the circumstances of the case, they had good reason to believe that the man they did engage in the capacity nominally of chief boatswain, but actually and in practice as second mate, was fully competent to perform the functions which would fall upon him to perform. The question is whether they have succeeded in so doing; and it is a matter of fact.

Some criticism has been made by the defendants of the form of Willmer J.'s judgment; and I think, if I may say so with all respect to him, that perhaps some of those criticisms are well founded. As I read the judgment, I am inclined to think that the judge may, in some parts of his judgment, have rather directed his attention to the question whether Sinon, with or without a certificate, was in fact incompetent for the task which he was performing. I venture to doubt whether that is really quite the right test. The question is not whether he was competent in fact, but whether the plaintiffs, the shipowners, had reasonable grounds for believing when he was engaged that he was. I think, again, that Willmer J. may have used language which would indicate that there was no challenge of the competence of Sinon; and in that respect, if the language leads to that conclusion, again I would venture to doubt whether it was quite justified. As Mr. Hayward pointed out, Sinon was not a man whom the defendants had engaged. They could not set up (or, at any rate, in this case had no means of setting up) some affirmative case for proving him incompetent; they put the question of his competence and the plaintiffs' belief in his competence in issue; and Mr. Hayward cross-examined the only witness who gave oral evidence, the captain, in a way plainly indicating that he strongly challenged the view that the master had expressed of Sinon's competence.

I do not wish to pursue this matter too far, but our attention was also directed to the passage in the judgment where the judge said [6]: " I think that Mr. Carpmael might have pressed his argu- " ment even further, because, even if the Ordinance is strictly " complied with, there cannot ever be any guarantee that the " officer in charge on the bridge at any given time will be a " certificated officer." With all respect, I rather doubt again whether that is a relevant consideration for our purpose.

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[6] Ante, 52, 58.

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But when those matters are set aside, we come back to the question which I have tried to formulate; in all the circumstances of this case, were the owners justified in the view which they undoubtedly put forward, and which they set out to prove, namely, that Sinon was as good as a certificated officer for the purposes for which he was engaged; and I have no doubt that Willmer J. upon that matter, having seen the master, Beer, concluded that the plaintiffs had, as a matter of fact, established that case to his satisfaction. I will say at once that, though I have not found the case entirely easy, I have come to the conclusion that there is no sufficient ground on which we could disturb the conclusion of the judge upon that matter of fact.

[His Lordship considered the evidence of the Director of Marine at Hong Kong to the effect that there was a shortage of certificated officers in Hong Kong, and that he had granted the vessel a clearance in July, 1951, considering her properly manned, since he was under the impression that she had been included in the lists of vessels exempted by the Governor-in-Council under subsection (19A). And further that the Mercantile Marine Department did not in practice require owners to comply strictly with section 4 (3) (*c*) of the Ordinance, but only with subsection (3) (*b*). After considering the evidence of the master and Sinon as to the competence of the latter, his Lordship considered the evidence of Leung Yew, the managing director of the plaintiff company. The evidence of the latter was to the effect that he understood that, in view of the shortage of certificated officers, the practice of the Marine Department did not require more than one certificated mate, and that he assumed that once, as in this instance, a clearance had been granted, the Marine Department was satisfied that the vessel was properly manned. And further that he had had no complaint or unfavourable report of Sinon, and that the latter's promotion to chief boatswain had taken place on the recommendation of the master, who at all times had spoken highly of him. His Lordship continued:] I think that that evidence shows that the plaintiffs, through their managing director, had made themselves aware of the relevant facts and that, in the light of the conditions as they were at Hong Kong, they had done what was necessary to satisfy the Mercantile Marine Department; and, moreover, and most important, Leung Yew, their managing director, had made himself aware, through the master, of the master's view and experience of Sinon as a competent officer. In those circumstances, I think that the managing director of the company did what he reasonably ought to have

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done. If, therefore, the view expressed by Beer, the master, of the competency of Sinon was justified or, more strictly, if he reasonably thought that Sinon was fit for the post for which he was engaged, then I think the same equally can be said of the managing director, Leung Yew.

The result of that analysis is, in my judgment, that in this case there was evidence which justified the judge's conclusion on the question of fact, and, as I have already said, we should not disturb it. Accordingly, the appeal should be dismissed.

JENKINS L.J. I agree. The onus is on the plaintiffs to show that they did not know, and could not reasonably have been expected to know, at the time when the *Empire Jamaica* sailed on the voyage during which the collision occurred, that Sinon was not capable of performing the duties of second mate. In seeking to discharge this onus, they are faced with the admitted fact that Sinon was not certificated, as he should have been, under the provisions of the Merchant Shipping Ordinance of 1949.

If Sinon had held a certificate, that would have been evidence, and I think cogent evidence, of competence. But does the converse apply; that is to say, did the absence of a certificate afford a ground on which the plaintiffs should be regarded as fixed with knowledge that Sinon was not competent to perform the duties of second mate? If Sinon had been a stranger to the plaintiffs and they had engaged him, uncertificated as he was, as a second mate, I think it might well have been held that the plaintiffs had been so negligent in the performance of their duty to see that the ship was properly manned that they could not be heard to say that the collision, which occurred through the incompetence of this uncertificated stranger, occurred without their actual fault or privity. But in actual fact Sinon was a man who had been many years at sea, who had been employed by the plaintiffs in this same ship, the *Empire Jamaica*, since, according to the master, August, 1946, and a man, further, who was experienced in watch-keeping duties and had in fact been performing the watch-keeping duties of a second mate since 1947, shortly after he joined the *Empire Jamaica*. The master had every confidence in him and regarded him as a perfectly reliable man, and reported on him as such to the plaintiffs' managing director.

In these circumstances, can it reasonably be held that the fact that Sinon possessed no certificate amounted in effect to notice to the plaintiffs that, notwithstanding their past wholly satisfactory experience of him, he was in fact incompetent? In my judgment, it cannot reasonably be so held. There was actual experience of Sinon's character and capabilities which showed him to be in fact a competent man, so far as anybody could tell.

[His Lordship considered the evidence of the Director of Marine at Hong Kong, and stated that it was clear that he considered the vessel to be properly manned, and it could be deduced from his evidence that if an application for exemption under subsection (19A) had been made, it would have been granted. He continued:] Clearly, if the plaintiffs' only fault was failure to apply for exemption under subsection (19A), that was not a fault which could have had any causal connexion with the collision. For all the influence that such exemption could have had on events at the critical moment, Sinon would have been on watch, as he was in fact, and he would have made the same mistakes, whatever they were, which led to the collision.

In my view, therefore, although the plaintiffs did commit a technical breach of the regulations, in that they only had one certificated mate when they ought to have had two, it cannot be held that this collision took place through their actual fault or privity; and, accordingly, although I do not agree entirely with all his reasons, I am of opinion that the judge came to a right conclusion and that this appeal should be dismissed.

PARKER L.J. I agree. The sole question to be determined in this appeal is whether the plaintiffs have discharged the onus, which is undoubtedly upon them, of showing that, though liable for the negligence of Sinon, no fault or privity on their part caused or contributed to the collision. As the first-named defendants have stressed, the difficulty of discharging that onus is not made easier by the fact that, as the judge found (and this is not disputed), the owners were privy to a breach of the requirements of the Hong Kong Ordinance.

[His Lordship summarized the facts, and continued:] The fact that the owners were privy to a breach of the Ordinance does not, of course, conclude the matter against them. Indeed, in a sense, that is merely part of the background of the case, by reason of which they are prevented from adducing the certificate as cogent evidence of the man's competency. The real question, to my mind, is whether the plaintiffs have proved that they were not privy to sending a ship to sea improperly manned. So far as the facts of this case are concerned, the issue can be further narrowed to this; have they shown that, as owners, they were

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entitled to believe, and did believe, that Sinon was competent to act as second mate? It was, I think, at one time suggested that to limit their liability the owners must go further and show that Sinon was in fact competent to act as second mate, but that, I think, is putting the onus too high. As I have said, I think the issue must be whether they were entitled to believe that he was competent, since only if they were not so entitled could they be said to be at fault.

[His Lordship then considered the evidence, and continued:] Accepting, as he did, the evidence of the master, the judge was, in my judgment, perfectly entitled to come to the conclusion that the plaintiffs had discharged the onus upon them, and I see no ground for interfering with his conclusion. I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Waltons & Co.; Hill, Dickinson & Co.*

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July 18, 19, 20, 21, 27.
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THYNNE (BATH, MARCHIONESS) *v.* THYNNE (BATH, MARQUESS).

Husband and Wife—Divorce—Practice—Amendment after decree—Particulars of second marriage ceremony set out in petition—No reference to earlier effective marriage—Decrees nisi and absolute—Jurisdiction to amend decrees—R.S.C., Ord. 70, *r.* 1.
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On a summons to amend a petition for dissolution of marriage and the decrees nisi and absolute granted thereon, by substituting for the particulars of the marriage ceremony which had been pleaded and proved in the proceedings those of an earlier marriage ceremony between the same parties to which no reference had been made:—

Held, that a decree of divorce dissolved the marriage status and not the marriage ceremony.

Dictum of Brett L.J. in *Niboyet* v. *Niboyet* (1878) 4 P.D. 1, 11 applied.

Held further (*per* Singleton and Morris L.JJ., Hodson L.J. dissenting), that the court had power under its inherent jurisdiction and also by virtue of R.S.C., Ord. 70, r. 1, to vary, modify or extend its own order so as to ensure the purposes of justice and correctly to express the intention of the court's order. It was to be inferred that the commissioner granting the decrees had intended to dissolve the marriage which subsisted, and that, but for the error in the petition statement, he would have dissolved the earlier marriage. In the circumstances the court was justified in exercising its discretion by amending the decrees so that they would not continue to include an erroneous recital and all uncertainty would be removed. The decrees would be amended to the extent of deleting from them the references to the date and place of the second ceremony of marriage and attaching to each decree a note stating that the recitals had been struck out by the Court of Appeal, that court being satisfied that the earlier marriage was the lawful marriage between the parties.

Hampson v. *Hampson* [1908] P. 355; 24 T.L.R. 868; *Marshall* v. *Marshall* (1909) 25 T.L.R. 716; observations of Scrutton L.J. in *MacCarthy* v. *Agard* [1933] 2 K.B. 417, 422; *Pearlman* (*Veneers*) *S.A.* (*Pty.*) v. *Bernhard Bartels* [1954] 1 W.L.R. 1457; [1954] 3 All E.R. 659; *Skeats* v. *Skeats and White* (1865) 35 L.J.P. & M. 47; dictum of Lord Penzance in *Lawrie* v. *Lees* (1881) 7 App.Cas. 19, 34 and 35 applied.

Per Singleton L.J. Although rule 4 of the Matrimonial Causes Rules, 1950, requires the date and place of the marriage to be stated, there is no such requirement in the Matrimonial Causes Act, 1950, and the recital should not be regarded as fundamental. It simplifies proof of the marriage, but it ought not to be regarded as an effective part of the decree.

Per Hodson L.J. The judgment of the commissioner carried out his intention and was, therefore, unalterable under the inherent jurisdiction of the court. *Hampson* v. *Hampson* (supra) was wrongly decided.

Decision of Lord Merriman P. [1955] 3 W.L.R. 108; [1955] 2 All E.R. 377 reversed.

SUMMONS (for leave to amend a petition for dissolution of marriage and decrees nisi and absolute).

On January 20, 1953, Daphne Winifred Louise Thynne, Marchioness of Bath, presented a petition for divorce against Henry Frederick Thynne, Marquess of Bath, on the ground of his adultery. Paragraph 1 of the petition stated that on October 27, 1927, the wife, then Daphne Winifred Louise Vivian, spinster, was lawfully married to the husband, then Viscount Weymouth, at the parish church in the parish of St. Martin-in-the-Fields, in the county of London. The certified copy of the marriage register, attached to the petition, gave the same particulars, with the addition that the husband was described as a bachelor.

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In her affidavit, verifying the petition, the wife swore that, inter alia, the statements contained in paragraph 1 of the petition, setting out the St. Martin's marriage, were true. She prayed that the court would, in the exercise of its discretion, decree that her said marriage might be dissolved. The petition also contained prayers for the custody of the youngest child of the marriage, for alimony pendente lite, and for maintenance for the wife and for that child, and for such secured provision as might be just.

On May 15, 1953, His Honour Judge Dale, sitting as a special commissioner at the Royal Courts of Justice, "having taken the "oral evidence of the [wife] in support of the petition . . . "pronounced that the [wife] had sufficiently proved the contents "of the petition, and, in the exercise of the discretion conferred "on the court by section 4 of the Matrimonial Causes Act, 1950, "pronounced that the marriage had and solemnized on the 27th "day of October, 1927, at St. Martin-in-the-Fields parish church "in the county of London between [the wife] and [the "husband] be dissolved, by reason that since the celebration "thereof the [husband] had been guilty of adultery, unless "sufficient cause be shown to the court within six weeks from "the making of the decree why such decree should not be made "absolute."

The suit was undefended. The husband took no part in the proceedings and did not dispute the charge made against him.

The decree was made absolute on June 27, 1953. The certification of this fact in form 16, prescribed by the Matrimonial Causes Rules, 1950, set out the names of the parties, referred specifically to the date and place of the marriage decreed by the decree nisi to be dissolved, and certified "that the said decree "was on June 27, 1953, made final and absolute, and that the "said marriage was thereby dissolved."

On July 11, 1953, the wife went through a ceremony of marriage with Alexander Fielding, who had been named in her discretion statement as a man with whom she had committed adultery, and on July 15, 1953, the husband went through a ceremony of marriage with Virginia Tennant, the woman named in the wife's petition. It was accepted by the court that production of the certificate that the decree nisi on the wife's petition had been made absolute must have been required before the husband and wife went through those marriage ceremonies respectively.

On July 7, 1954, Wallington J. made an order approving a deed of family arrangement dated June 27, 1954, and a conveyance and deed of discharge of the same date, as furnishing suitable and sufficient maintenance and secured provision for the wife for her life, to take effect from that date. It was further ordered that an interim order for maintenance at the rate of £4,000 per annum be discharged, with effect from the same date.

On October 6, 1954, Karminski J. confirmed the report of Mr. Registrar Forbes, and ordered that what was described as the " ante-nuptial " settlement, made on October 25, 1927,—two days before the St. Martin's marriage—be varied " by extinguish-" ing all the rights, powers and interests of the husband therein, " as though he were dead, and the wife had survived him; and " that the power to revoke and reappoint contained in a revocable " appointment, dated January 18, 1939, be vested solely in the " wife to the exclusion of the husband."

The wife subsequently published her reminiscences, and the following facts, which were set out in her affidavit in the present proceedings, then came to the knowledge of her solicitors for the first time.

The husband came of age in 1926. The proposed marriage between the parties was strongly opposed at the time by their respective families, and the parties therefore decided to get married secretly. In order that the proposed marriage might not be discovered, the husband, when applying for the marriage licence, transposed his Christian names, and omitted " Daphne " from the wife's Christian names, presumably because, as appeared from the signature of her petition, it was the one she habitually used. Accordingly, on October 8, 1926, they went through a ceremony of marriage at St. Paul's Church, Knightsbridge, London. They were described in the marriage register as Frederick Henry Thynne, bachelor, aged 21, and Winifred Louise Vivian, spinster, aged 22. In spite of the fact that the respective fathers' names were given and both were stated to be peers of the realm, the deception was apparently successful, for the wife's affidavit showed that none of their friends or relations was present at the ceremony.

By April, 1927, the opposition of the families to the intended marriage had been retracted. In the circumstances the husband and wife decided not to inform them that they were already married for fear of the trouble and distress this might have caused. With the approval of their families, they became officially " engaged " and, in contemplation of the proposed marriage, entered into certain settlements involving, inter alia, very substantial transfers of property. These included the so-called "ante-nuptial" settlement to which reference has already been made.

On October 27, 1927, the ceremony of marriage at the church of St. Martin-in-the-Fields took place between the parties in the presence of all their friends and relations, who were still unaware of the previous marriage. The wife also stated in her affidavit that in the course of time she came to look on this later ceremony as the valid marriage, and that she at all times regarded that ceremony as constituting a valid marriage; and that when she presented her petition for divorce she had firmly in mind that the second ceremony was the one to be dissolved; that she gave no thought to the secret marriage, and that she did not inform her solicitors about it. It was only after the publication of her reminiscences that the matter was brought to her attention by her solicitors.

In this circumstance the wife issued a summons calling on the husband (who supported her application) to show cause why she should not be at liberty to amend paragraph 1 of her petition by striking out the date "the 27th day of October, 1927," and inserting in its place "the 8th day of October, 1926"; by inserting after the word "Vivian" the words "in the marriage "certificate described as Winifred Louise Vivian"; by inserting after the words "Viscount Weymouth" the words "in the "marriage certificate described as Frederick Henry Thynne"; and by striking out "the parish church in the parish of St. "Martin-in-the-Fields in the county of London," and inserting in place thereof "St. Paul's Church in the parish of St. Paul's, "Knightsbridge, in the county of Middlesex"; and applying for an order that the decree nisi and the decree absolute respectively be amended by striking out therefrom the date and place of marriage and description of the husband therein appearing, and inserting in place thereof the date and place of marriage, and descriptions of the wife and husband appearing in the petition amended as aforesaid.

Anthony Harmsworth for the wife.
Victor Russell for the husband.

Cur. adv. vult.

The summons was heard before the President in chambers, and on May 5 he delivered the following considered judgment in open court, dismissing the summons.

LORD MERRIMAN P., having referred to the wording of the petitions and decrees, to the subsequent ceremonies of marriage, and to the orders of July 7, 1954, and October 6, 1954, concerning the deed of family arrangement and the variation of settlement, as set out above, continued: The orders to which I have referred were, of course, ancillary to the decree absolute in this suit, and it is right to notice that the eldest son, Lord Weymouth, expressly consented to the variation of the settlement, that the younger children were represented by counsel, who satisfied the court that the variation did not in any way prejudice their interests; and that I was informed that there are no children of either of the fresh unions.

Nevertheless, it is obvious that it is by no means certain that nothing has intervened since the decrees in this suit were made which might render it inexpedient, or even inequitable, to correct their terms, whether under the inherent jurisdiction of the court or under R.S.C., Ord. 28, r. 11.[1] Indeed, it was stated in the course of the argument that the so-called "ante-nuptial" settlement of October 25, 1927, could only be dealt with by legislation, on the ground that it was, in the circumstances, a nullity.

[His Lordship referred to the matters in the wife's affidavit substantially as set out above, and continued:] Accepting, as I naturally do, the wife's statement that she omitted to inform her solicitors of the St. Paul's marriage, with the implication that it first came to their knowledge from the publication of her memoirs, I must not be taken to accept unreservedly the wife's statement as to the completeness or the duration of her oblivion of the St. Paul's marriage. As the wife has not been cross-examined on her affidavit, it is undesirable for me to say more than that it is possible that in instructing her solicitors as she did when she presented her petition, she may have done so because she realized that to plead the St. Paul's marriage, and to swear to it in the affidavit verifying her petition, and, indeed, to give evidence in support of that marriage at the hearing, as she would have to do, would inevitably have exposed to her family and friends the deception which had admittedly been practised on them in 1927, and had apparently been sedulously maintained thereafter—at any rate, until the publication of her memoirs.

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[1] R.S.C., Ord. 28, r. 11: "Clerical mistakes in judgments or "orders, or errors arising therein "from any accidental slip or omission, may at any time be corrected "by the court or a judge on motion "or summons without an appeal."

The issues arising out of the falsity of the information about her status, and that of the husband, in connexion with the St. Martin's marriage, and in her affidavit verifying her petition, and her evidence about that marriage at the hearing, and finally in uttering in connexion with her present marriage the certificate of the decree absolute dissolving the St. Martin's marriage, are matters which may be for consideration by others. [His Lordship stated the nature of the summons, and continued:] I am invited by Mr. Harmsworth for the wife, supported by counsel for the husband, to do this on the authority of *Hampson* v. *Hampson*.[2] In that case there had been a marriage in a registrar's office in March, 1899, and a subsequent form of marriage was gone through in church in June, 1899. In the wife's petition for dissolution—as in this case—the marriage was stated to have been celebrated on the second occasion in the church, and the decree nisi and the decree absolute subsequently pronounced referred only to that ceremony of marriage.

I have examined the record in that case. The facts differ, inasmuch as there was no question of remarriage, nor was there any suggestion of an attempt at concealment of identity on the occasion of the first marriage, as in this case. On the other hand, the record shows that between the decree absolute on August 28, 1907, and the motion to rectify the decrees nisi and absolute filed on July 10, 1908, there had been leave to file a petition for maintenance out of time, and an order made by the judge on May 18, 1908, confirming the registrar's report in connexion with the variation of an ante-nuptial settlement.

The wife applied by motion that the decrees nisi and absolute might be rectified by inserting the marriage at the register office instead of the subsequent ceremony of marriage in church. Sir Gorell Barnes P. thought it right to amend the petition as well as the decrees, and allowed the wife to take the order for the amendment of all three on affidavit of service of the notice of motion, but refused to allow the costs to be taxed against the respondent.

This case was followed, more particularly with reference to the question of costs, in *Marshall* v. *Marshall*.[3] In that case there had been a Scottish marriage by declaration in the presence of two witnesses in 1904, but by reason of some unnecessary doubts as to its validity which were subsequently entertained the parties in 1906 went through another ceremony of marriage at the Sheriff's Court in Edinburgh. In the petition presented by the wife to this court in 1908, on the grounds of the husband's desertion and adultery, the wife, under the mistaken idea that the first ceremony was invalid, referred only to the second ceremony, and in October, 1908, a decree nisi was pronounced. Apart from the doubts about the validity of the first marriage, that case differs from *Hampson* v. *Hampson*,[4] inasmuch as the motion to amend the petition and the decree nisi was made before the decree nisi was made absolute. There was, however, the complication that the alleged desertion for the statutory period was based, by virtue of section 5 of the Matrimonial Causes Act, 1884, upon non-compliance with a decree for restitution of conjugal rights. It was thought, therefore, that the petition and the decree in the restitution suit needed amendment. This Sir John Charles Bigham P. allowed, although there was no motion to that effect, and counsel for the husband, while not dissenting, did not consent. Amendment of the decree nisi was also allowed, but without costs.

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[2] [1908] P. 355; 24 T.L.R. 868.

[3] (1909) 25 T.L.R. 716.

I have been pressed by counsel both for the husband and for the wife with the argument that I am obliged to follow these decisions of my two distinguished predecessors. I must say in passing that I wish that the wife had followed those authorities in the matter of procedure. This application was made by summons, so I was informed, on the authority of Rayden on Divorce (6th ed., p. 619, para. 11), where these cases are cited as authorities for the statement that the procedure should be by summons; but in both of them, as the reports show, the application was by motion. In my opinion, a matter of such importance ought to have been brought before the court by motion. However that may be, I was not prepared to give my decision in camera; but as the matter was not listed in open court I was unable to adjourn it into court for judgment then and there, and was therefore obliged to reserve my judgment.

As regards the merits of the application, I need not say, having regard to the unbounded respect that I have both for Lord Gorell and for Lord Mersey, that I would most readily be guided by *Hampson* v. *Hampson*,[5] followed as it was to some extent by *Marshall* v. *Marshall*,[6] if I could convince myself that there is any ground upon which the decision can be supported. It is true that these cases were decided as long ago as 1908 and 1909 respectively; but it is not as if they had regulated practice meanwhile, for so far as I am aware no subsequent decision of the court has been based upon either of them.

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[4] [1908] P. 355.

[5] Ibid.

[6] 25 T.L.R. 716.

As regards *Marshall* v. *Marshall*,[6] the extensive powers of the court in relation to a decree nisi are, in my opinion, beside the point. Without going back to the earlier practice of the ecclesiastical courts, it is sufficient, for example, to allude to the power to set aside a decree nisi on the intervention of the Queen's Proctor, amongst other persons, on the ground that the decree was obtained contrary to the justice of the case, and to the power of the Divisional Court under rule 36 of the Matrimonial Causes Rules, 1950, to set aside the decree made by a judge alone where no error on the part of the court at the hearing is alleged. As regards the incidental amendment in that case of the petition and the decree in the suit for restitution of conjugal rights, non-compliance with which was then, as I have said, the equivalent of the statutory period of desertion, there is, in my opinion, no comparison between a decree absolute of divorce, which finally affects the status of the parties, and a decree for restitution of conjugal rights, the power to enforce which by attachment was abolished by section 2 of the very Act[7] which made failure to comply with the decree for restitution the equivalent of the statutory period of desertion.

In relation to a decree nisi, however, reference should be made to *Hewett* v. *Hewett and Dupin*.[8] In that case, as in this, the parties had gone through two ceremonies of marriage, the first secretly at St. Stephen's Church, South Kensington, in October, 1918, and the second at St. Paul's Church, Knightsbridge, in January, 1921; but unlike the facts in *Marshall* v. *Marshall*,[9] there was no doubt about the validity of the first marriage. In pronouncing decree nisi Hill J. was asked to insert a reference to the second ceremony in the decree, but he declined to interfere, saying that if people went through a second ceremony it was their own affair. It could not be a marriage because they had already been married. The marriage of October, 1918, which he then dissolved was the legal marriage. He could only dissolve marriages. He could not dissolve anything else. If people chose to go through idle ceremonies he should not assist them. If it was desired to get rid of the second ceremony the court must be asked for a declaration of nullity.

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[6] 25 T.L.R. 716.
[7] Matrimonial Causes Act, 1884.
[8] (1929) 73 S.J. 402.
[9] 25 T.L.R. 716.

Hampson v. *Hampson* [10] is, on the other hand, with the exception already mentioned, precisely in point. There is nothing to show, however, on what foundation Lord Gorell acted in altering a decree absolute. It was decided in *Woolfenden* (*orse. Clegg*) v. *Woolfenden* (*orse. Clegg*) [11] that the court has authority to set aside a decree absolute if it is a nullity. Equally, whether under the slip rule or by virtue of the inherent jurisdiction of the court, I do not doubt that the court has power, in an appropriate case, to correct error in a decree absolute arising from any accidental slip or omission; and the slip rule in its present form was in force in 1908. Indeed, by virtue of rule 80 of the Matrimonial Causes Rules, 1950, R.S.C., Ord. 28, r. 11, applies to this court. But I am not aware of, nor have I been referred to, any other authority for power to alter a decree absolute except *Hampson* v. *Hampson*.[12]

On the contrary, in *Everitt* v. *Everitt*,[13] in a judgment which I gave when presiding in the Court of Appeal, on behalf of Lewis J. and myself, with which Bucknill L.J. expressly agreed, I am reported as saying that there was no precedent for an application under rule 36 of the Matrimonial Causes Rules, 1947, after decree absolute; and that, although it was unnecessary to decide more than that the particular appeal was properly brought in the Court of Appeal, the judgment suggests—and it is a view that I know is shared by the judges of this division—that, except in the case of slip, or of a judgment that is a nullity, it is the Court of Appeal alone which can deal with error in a decree absolute. *Everitt* v. *Everitt* [13] was cited with approval by Evershed M.R. in *Prince* v. *Prince*.[14]

I need hardly say that both counsel rejected with equal emphasis the bare idea that the decree absolute should be set aside as a nullity. As I have no such application before me, I need only add that, even if I have jurisdiction to accede to the present application, and if the amendments proposed are intended to ensure that no question shall arise about the validity of the subsequent marriages, I am by no means sure that this object would be attained. If, as is argued, the husband and wife were divorced on June 27, 1953, when the decree was made absolute, nothing more is necessary. If they were not then divorced by reason of inherent defect in the process from beginning to end, or otherwise, I cannot divorce them now with retroactive effect. It remains, however, to consider whether I have power to correct the decrees, either under the slip rule or by virtue of the inherent jurisdiction of the court, whatever the effect of so doing may be.

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[10] [1908] P. 355.

[11] [1948] P. 27; 63 T.L.R. 582; [1947] 2 All E.R. 653.

[12] [1908] P. 355.

[13] [1948] W.N. 237, 345; 65 T.L.R. 121; [1948] 2 All E.R. 545.

[14] [1951] P. 71; 66 T.L.R. (Pt. 2) 493; [1950] 2 All E.R. 375.

In support of the court's decision in *Hampson* v. *Hampson* [15] I was pressed with the argument that the commissioner intended to dissolve whatever really was the marriage between the husband and wife, and that the reference to the wrong ceremony was merely a defect in form. But it may be that this argument merely begs the whole question.

As to the application of the slip rule and the inherent jurisdiction of the court, I am content to rely upon the decision of the Court of Appeal in *MacCarthy* v. *Agard*,[16] where earlier decisions of the Court of Appeal, *In re Swire* [17] and *Preston Banking Co.* v. *William Allsup & Sons* [18] were considered and followed. In *MacCarthy* v. *Agard* [19] a woman was sued as "Mrs. A., a married "woman," and judgment was obtained against her in the form settled in *Scott* v. *Morley*.[20] She was neither Mrs. A. nor was she a married woman, but was in fact Mrs. W., and was a widow, she having kept back from, and actively misrepresented to, the court her real name and status.

The real facts being ascertained, the plaintiff applied to have the judgment altered to a personal judgment against her as Mrs. W., a widow. The majority of the Court of Appeal, Greer and Romer L.JJ., held that there was no jurisdiction to amend the judgment, either under the slip rule or under the inherent jurisdiction of the court, inasmuch as the judgment had been intentionally given in the form in which it was. Scrutton L.J. dissented, and it is not unimportant to cite one passage in his judgment, which shows the ground on which he based his dissent [21]: "In "my view this is a case in which the court is entitled to say: "'You, the appellant, have deceived us and have thereby induced "'us to give a judgment in a form to which you were not "'entitled; we therefore decline to allow you to keep the judg-"'ment obtained in that form by your deception.' I should be "sorry to think that the inherent power of the court is to be in "any way limited by rules." The other members of the court, however, rejected the view that misrepresentation made any difference. Greer L.J. said[22]: "Instead of appealing from the "judgment that was entered in this case and saying that it should "be reversed because it was given in the form in which it was, "and the action was brought in the form it was by reason of the "false pretence of the appellant that she was Mrs. Agard, a "married woman, the respondent applied by summons to the "master to amend the judgment. If proper proceedings were "taken I cannot conceive that this judgment would be allowed "to stand, but that is not the question we have to determine. "The question for us is whether under the rules relating to "procedure the court can under the slip rule or under its inherent "jurisdiction set aside a judgment which has been intentionally "entered in the way it was, or whether the court is bound to "leave the party aggrieved to the remedy of appealing or bringing "an action to set aside the judgment." He added[23]: "No "doubt the judgment was drawn up by a clerk in the office, but "as drawn up it accurately represented what the master decided." Greer L.J. then approved[24] as being accurate the statement in the Annual Practice for 1933, beginning: "'The error or omis-"'sion must be an error in expressing the manifest intention of "'the court,'" and ending with the sentence: "'If the order "'as drawn correctly expressed the intention, it cannot be "'corrected under this rule or the inherent jurisdiction, even if "'the decision of the court is procured by fraud or misrepre-"'sentation.'"

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[15] [1908] P. 355.
[16] [1933] 2 K.B. 417.
[17] (1885) 30 Ch.D. 239.
[18] [1895] 1 Ch. 141.
[19] [1933] 2 K.B. 417.
[20] (1887) 20 Q.B.D. 120; 4 T.L.R. 56.
[21] [1933] 2 K.B. 417, 422.

That statement is repeated in the current issue and the slip rule remains unaltered, in spite of the suggestion, which was made both by Greer and Romer L.JJ., that some fresh rule should be passed to fit such a case without the necessity for appeal or fresh action.

Romer L.J. relied on the judgment of Lord Halsbury sitting in the Court of Appeal in *Preston Banking Co.* v. *Allsup & Sons*,[25] to the effect that jurisdiction to correct an order drawn up in the form intended by the court, even if the order had been obtained by fraud, would be most mischievous, and that it was immaterial whether the application to rehear was made to the judge who made the order, because if one judge can rehear the order so can another. Romer L.J. then considered[26] the contention that in *MacCarthy* v. *Agard*[27] the court intended to give an effective judgment against the appellant; but he rejected that contention on the ground that on the facts before him the master was led to believe that the appellant was a married woman, and it was in those circumstances that the judgment was in the *Scott* v. *Morley* [28] form. He added [29] that that was the intention of the court, and that in those circumstances it was impossible to alter that order and make it one under which the appellant should be unconditionally liable.

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[22] [1933] 2 K.B. 417, 423.
[23] Ibid. 424.
[24] Ibid.
[25] [1895] 1 Ch. 141, 143.
[26] [1933] 2 K.B. 417, 426.
[27] [1933] 2 K.B. 417.

It seems to me that there is a very close resemblance between that particular contention and the contention of counsel in this case, that the commissioner intended to divorce this husband and this wife, and that I am now merely being invited to correct the form of the judgment to give effect to that intention.

This argument assumes that, provided there was a subsisting marriage which the court could dissolve, it is a mere matter of form that the petitioner pleads some marriage other than that which is the subsisting marriage, and that the court expressly pronounces that it is such other marriage that is dissolved by its decree.

Without referring to the practice of the old ecclesiastical courts, I have looked at the Rules and Regulations for Her Majesty's Court for Divorce and Matrimonial Causes made by Lord Penzance, then Sir James Plaistead Wilde, Judge Ordinary of the court by virtue of the power conferred upon him by the Matrimonial Causes Act of 1857, and the amending Acts of 1858, 1859, 1860 (which, among other things, introduced the decree nisi), and of 1862, which perpetuated the provisions of the preceding Act. The rules came into force on January 11, 1866.

Rule 1 provides that proceedings before the court shall be commenced by filing a petition, and refers to form 1 in the Appendix IV, the first paragraph of which is: "That your "Petitioner was on the day of , 18 , lawfully married "to C.B., then C.D. (spinster or widow), at the parish church "of, etc. (Here state where the marriage took place.)" Rule 2 contains provisions that every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and that such affidavit shall be filed with the petition. Section 29 of the Act of 1857 enjoins upon the court the duty "to satisfy itself, so far as

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[28] 20 Q.B.D. 120.

[29] [1933] 2 K.B. 417, 427.

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"it reasonably can, not only as to the facts alleged," but also as to connivance, condonation, and any countercharge which may be made against the petitioner.

In substance the same provisions are in force today. The corresponding rules made by virtue of section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, are the Matrimonial Causes Rules, 1950, rr. 3 (1), 4 (1) (*a*) and 6 (1); and section 4 (1) of the Matrimonial Causes Act, 1950, now represents section 29 of the original Act. "The facts alleged" manifestly include the facts of the marriage which the petitioner is obliged to plead and to prove. Moreover, form 16, the prescribed form of "Certificate of making decree nisi absolute (divorce)," refers specifically to the date and place of the marriage to be dissolved.

If further authority is needed for the proposition that precision about the marriage to be dissolved is essential, it is to be found in *Reder* v. *Reder*,[30] in which the Court of Appeal decided that it is improper for the trial judge to decree the dissolution of whichever of two marriage ceremonies created the marriage.

In my opinion, therefore, it is not merely as a matter of form that petitioners are required by the Matrimonial Causes Rules, 1950, which are statutory, to assert and to prove the particular marriage which they pray the court to dissolve, or that the certificate of the decree having been made absolute sets out the precise ceremony of marriage which is declared to have been dissolved. In my opinion precision in the pleading and the proof of the marriage in question is a matter of substance. Therefore, when it is argued that the commissioner intended to give a valid decree of divorce as between this husband and this wife, I am bound, in my opinion, to hold that he can only be taken to have intended to decree that the marriage alleged and proved to have taken place was dissolved, and that there is nothing which can remotely be called an accidental slip or omission in recording that decision, whether it is the slip rule or the inherent jurisdiction of the court that is invoked.

That being my opinion, I have no option but to dismiss this summons. I give leave to appeal.

Rule accordingly.

J. B. G.

The wife appealed, and her appeal was supported by counsel for the husband. The husband also, by motion, asked for leave

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[30] [1948] W.N. 238.

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to appeal against the decree absolute, notwithstanding that the time for appealing had expired.

Geoffrey Lawrence Q.C. and *Anthony Harmsworth* for the wife. This is a matter of vital importance to four persons, who are at present uncertain as to their status in the events which have happened. It is desired to preserve the decrees and to amend them.

[SINGLETON L.J. I would like to know what the wife, who is now Mrs. Fielding, wrote in her memoirs about the secret marriage. There may be some question as to whether she realized its importance.]

There is no desire not to face up to the position which has arisen. The court will be able to see the book of reminiscences. The wife could have mentioned it to her solicitors or at the hearing of the petition have had it amended. Unfortunately the petition got off on the wrong foot and stayed on the wrong foot. It is not sought to shift the blame from the wife's shoulders.

[SINGLETON L.J. Are you asking this court to say that the decree absolute is a nullity?]

No! This is an application not to rescind the decree but to amend it, and it is submitted that the decision of Sir Gorell Barnes P. in *Hampson* v. *Hampson*[1] can and should be supported. Although the reasons for the decision do not appear in the report, that judge must have acted by virtue of the court's inherent jurisdiction. There is no reason why what has been done by so distinguished an authority should not be done again. The commissioner was intending to divorce these parties and it cannot be doubted that if this secret marriage had been brought to his notice he would have given leave to amend the petition. We ask not only for leave to amend but also to date the decrees back.

[SINGLETON L.J. The questions are (1) whether this court has power to do that, and (2) if it has power, ought the court to do it?]

In *Marshall* v. *Marshall*[2] Sir John Charles Bigham P. followed the decision in *Hampson* v. *Hampson*.[3] If there is a power to amend, then it is submitted that there is no distinction in principle to be drawn between a decree nisi and a decree absolute. If there is no distinction to be drawn *Marshall* v. *Marshall*[2] is a reinforcement of the decision in *Hampson* v. *Hampson*.[3] It is not suggested that the court has power to amend under the slip rule, for here there is no error at all, but it is contended that over and above the jurisdiction to amend clerical errors the court has power to make amendments in order to obtain justice. The rules of court have sought to obtain a very wide power of amendment, and Ord. 70, r. 1, certainly confers jurisdiction to amend and strengthens the submission now made on behalf of the wife. It is not sought to alter the substantive judgment, which is a decree of divorce, but merely to amend the misnomer of the action.

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[1] [1908] P. 355.
[2] (1909) 25 T.L.R. 716.
[3] [1908] P. 355.

[SINGLETON L.J. Is there any injustice, in principle, in amending where both parties wish the amendment to be made?]

There would appear to be none. Moreover, in a divorce case the State has an interest and here there are other persons interested.

[MORRIS L.J. Do you place any limit on the inherent jurisdiction of the court?]

The court must have an inherent jurisdiction over its own records, to see that they are put right—not merely textually right, but that they record what was the intention of the parties and of the court. That must have been the jurisdiction exercised by Sir Gorell Barnes in *Hampson* v. *Hampson*[3] and by Sir John Charles Bigham in *Marshall* v. *Marshall.*[4] The difficulty of Lord Merriman P. was one of jurisdiction. If he had thought that he had jurisdiction he would have made the order asked for.

[*Skeats* v. *Skeats and White*[5]; *Wiseman* v. *Wiseman*[6]; *MacCarthy* v. *Agard*[7]; *Pearlman (Veneers) S.A. (Pty.)* v. *Bernhard Bartels*[8]; *Lawrie* v. *Lees*,[9] and *Reder* v. *Reder*[10] were also referred to.]

G. E. S. Simon Q.C. and *Victor Russell* for the husband. On the question whether the court has jurisdiction to amend, and whether it should exercise that jurisdiction, the husband is in accord with the wife. He desires to ascertain not only his own status but also that of his present wife. The questions for determination by the court are: (1) Is the decree that has been pronounced valid or a nullity? (2) If it is in some sense defective, does the defect render it void ab initio or is it only voidable? (3) If it is voidable has the time which has elapsed precluded, or have circumstances supervened which preclude, its being set aside as opposed to its being corrected? (4) If it is only voidable can it be corrected? (5) What is the real nature of the decree? When it is said that a decree dissolves a marriage, is what is meant that it dissolves the status of marriage and not merely the particular ceremony which creates the status? In the events that have happened it has been affirmed that the decrees are not void ab initio, but only voidable, and it is too late to set them aside. Therefore either they stand, asserting a fact which is known to be false, or else the court has power to correct that fact. In other words, the court is faced with the alternative of res judicata or correction.

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[3] [1908] P. 355.
[4] 25 T.L.R. 716.
[5] (1865) 35 L.J.P. & M. 47.
[6] [1953] P. 79.
[7] [1933] 2 K.B. 417.
[8] [1954] 1 W.L.R. 1457.
[9] (1881) 7 App.Cas. 19.
[10] [1948] W.N. 238.

The granting of a decree of divorce dissolves the status of marriage and not the particular ceremony which created it, and so far as the decrees nisi and absolute are concerned it is immaterial how the status is created. Therefore, it is submitted, the reference to a particular ceremony in the decrees is not fundamental and can be corrected: see *Pearlman (Veneers) S.A. (Pty.)* v. *Bernhard Bartels.*[11] The court should, it is contended, in the exercise of its inherent jurisdiction, correct its own records and bring them into accord with other records, so that no other person will be prejudiced hereafter. The court cannot amend the effective parts of a decree of divorce, declaring the status of the parties to a marriage and finding that a matrimonial offence has been committed, but short of altering the effective parts of a decree the court has jurisdiction to amend its records for the purpose of doing justice. The court must be satisfied that the parties before it are husband and wife, and it is unnecessary to specify the date and place of the marriage ceremony. If that is not essential then this case falls within the decision in *Pearlman (Veneers) S.A. (Pty.)* v. *Bernhard Bartels*[11] and not within *MacCarthy* v. *Agard.*[12]

R.S.C., Ord. 40, r. 4, is ultra vires inasmuch as it cuts down the statutory jurisdiction of the court. Non-compliance with the rules can be dispensed with under Ord. 70, r. 1.

It is submitted that *Skeats* v. *Skeats and White,*[13] *Hampson* v. *Hampson,*[14] *Marshall* v. *Marshall*[15] and *Reder* v. *Reder*[16] were correctly decided, and that this court has jurisdiction to amend at any rate the descriptive parts of the decrees; that the identification of the ceremony which creates the status of marriage is not a statutory requirement and not essential. If this court is against the appellants on this matter it is hoped that guidance will be given to the parties as to their legal position.

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[11] [1954] 1 W.L.R. 1457.

[12] [1933] 2 K.B. 417.

[13] 35 L.J.P. & M. 47.

[14] [1908] P. 355.

[15] 25 T.L.R. 716.

[16] [1948] W.N. 238.

[SINGLETON L.J. We shall give judgment on the facts before us, but you ask that we should also advise the parties as to their future.]

Only to elucidate the law on the facts before the court. There is authority for the submission that where a judgment is voidable the court will not set it aside if a third party has acquired rights under it, unless to do so would cause less hardship to the third party than to one of the parties before the court: *Wiseman* v. *Wiseman.*[17]

Sir H. Hylton-Foster Q.C., S.-G. and *Colin Duncan* for the Queen's Proctor, as amicus curiae. It is agreed that the decrees are not null and void, but only voidable. The court is, however, invited to amend history, not to make an order of its own. The wife has put in her petition not a misdescription of a valid marriage but an extremely accurate description of an invalid ceremony. The effect was to reduce by a year the period of time which the court had to examine for the exercise of its discretion. It is not contended that it would not be desirable to help these persons out of their difficulties if that were possible, but if the court amend this decree as it is now asked to do it would be falsifying the record of the court in order to represent that the commissioner in 1953 had addressed his mind to things to which he had not addressed his mind at all and which were not before him.

[MORRIS L.J. It has occurred to me that there might be an indorsement on the decrees in some such words as follow: "The "court being satisfied that the marriage between the said parties "was solemnized on the 8th day of October, 1926, at the parish "church of St. Paul . . . and not at the place and on the date "set out in the petition, doth order that an indorsement of this "fact be recorded on the decrees nisi and absolute by which the "marriage between the said parties was dissolved."]

[SINGLETON L.J. I suggest that this court might strike out all the words in the decrees nisi and absolute referring to the date and place of the ceremony in 1927 and put in the margin the following indorsement: "These words were struck out by the "Court of Appeal on (such date) the court being satisfied that "the marriage was solemnized on October 8, 1926, at" (name of church).]

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[17] [1953] P. 79.

That would mean that this court was so satisfied and not that the commissioner in 1953 was so satisfied. It would not mean that any court had discharged the statutory duty of finding the case for the petitioner proved. It would be a device to conceal the fact that the commissioner had never addressed his mind to the question of the valid marriage in 1926. The court has no power to make such an amendment. The court must not alter its records in a way which makes them untrue.

[MORRIS L.J. Can you suggest anything which the court could do?]

I am afraid we cannot.

Colin Duncan. I have considered with the Queen's Proctor the tentative suggestion made by Morris and Singleton L.JJ. and it has occurred to me that it is an excellent one, as opposed to an amendment, which I submit the court could not make. If a realistic view is taken of the matter it would, I think, achieve all the results desired.

Counsel for the wife and husband also intimated acceptance of the suggestion.

Cur. adv. vult.

July 27. The following judgments were read.

SINGLETON L.J. The wife and the husband were married at St. Paul's Church, Knightsbridge, on October 8, 1926. They were both quite young: as there was some objection on the part of relations, they had decided to get married secretly. In paragraph 3 of her affidavit in support of the summons the wife deposes: "In order that our proposed marriage might not be "discovered my former husband, when applying for the marriage "licence, transposed his Christian names and omitted my first "Christian name. On the 8th day of October, 1926, we were "married at St. Paul's Church, in the parish of St. Paul's, "Knightsbridge, in the county of Middlesex. None of our friends "or relations were present at the said ceremony. There is now "produced and shown to me marked 'A' a certified copy of the "entry in the register relating to the said marriage." Everyone agrees that the marriage of October 8, 1926, was a lawful marriage. On October 27, 1927, they went through a second ceremony of marriage—this time at St. Martin-in-the-Fields—and their friends and relations were present. On January 20, 1953, the wife launched a petition in which she sought a dissolution of marriage on the ground of the adultery of the husband, and she asked for the discretion of the court to be exercised in her favour. The petition was heard by His Honour Judge Dale, sitting as special commissioner, on May 15, 1953, and he granted a decree nisi of dissolution to the wife. The decree was made absolute on June 27, 1953.

Some time afterwards the wife wrote a book in which she referred to the secret marriage, of which her legal advisers had had no knowledge. In the result there came a summons, dated April 20, 1955, by which the wife sought liberty to amend paragraph 1 of the petition, "by striking out the date '27th day of " 'October 1927' and inserting in place thereof the date '8th day " 'of October 1926'; by inserting after the word 'Vivian' the " words 'in the marriage certificate described as Winifred Louise " 'Vivian'; by inserting after the words 'Viscount Weymouth' " the words 'in the marriage certificate described as Frederick " 'Henry Thynne' and by striking out the words 'the Parish " 'Church in the Parish of St. Martin-in-the-Fields in the County " 'of London' and inserting in place thereof the words 'St. Pauls " 'Church in the Parish of St. Paul's, Knightsbridge in the county " 'of Middlesex.'" She also asked for an order that consequential amendments should be made in the decree nisi and in the decree absolute.

The wife had said that she was married on October 27, 1927, at St. Martin-in-the-Fields and the decree which was granted to her was drawn upon that basis.

With reference to the second ceremony, the wife in her affidavit said in paragraph 7: "Thereafter, in the course of time " I came to look upon the latter ceremony as the valid marriage, " and I have in fact at all times regarded such ceremony as " constituting a valid marriage.

"(8) When I gave instructions to my solicitors to present my " said petition for divorce I had firmly in my mind that the said " second ceremony of marriage was the one to be dissolved and I " gave no thought to the said secret marriage, nor did I inform " my solicitors thereof.

"(9) On the 11th day of July, 1953, I was married to my " present husband, Alexander Fielding, believing that I was free " and fully entitled to do so. I am informed by my former " husband and verily believe that he was married on the 15th " day of July, 1953, to Virginia Tennant, the woman named in " my petition.

"(10) I have recently published a book of reminiscences in " which I referred to my said secret marriage and it was only

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"after the publication thereof that the matter in question was "brought to my attention by my solicitors.

"(11) Subsequently I instructed my solicitors to take steps "if possible to put the matter right.

"(12) I am deeply conscious of the seriousness of the position "which has arisen as the result of my neglect to inform my "solicitors of my said secret marriage when instructing them to "prepare and present my said petition. In the premises I can "only pray that this honourable court will accept my assurance "that such omission on my part was not intentional or calculated "in any way to deceive or mislead and that, therefore, I may be "granted the relief which I humbly crave."

The summons came before Lord Merriman P., and on May 5, 1955, he held that he had no option but to dismiss it. It may be that he regarded the decree as a nullity and that he could not by amendment make that which was a nullity into an effective decree. He is reported as having said [1]: "I need hardly say "that both counsel rejected with equal emphasis the bare idea "that the decree absolute should be set aside as a nullity. As "I have no such application before me, I need only add that, "even if I have jurisdiction to accede to the present application, "and if the amendments proposed are intended to ensure that "no question shall arise about the validity of the subsequent "marriages, I am by no means sure that this object would be "attained. If, as is argued, the husband and wife were divorced "on June 27, 1953, when the decree was made absolute, nothing "more is necessary. If they were not then divorced by reason "of inherent defect in the process from beginning to end, or "otherwise, I cannot divorce them now with retroactive effect. "It remains, however, to consider whether I have power to "correct the decrees, either under the slip rule or by virtue of "the inherent jurisdiction of the court, whatever the effect of "so doing may be."

This leaves the parties in a state of uncertainty. If it is assumed that the decree is a nullity and a new petition is launched it will be met by rule 3 (2) of the Matrimonial Causes Rules, 1950, which provides that it cannot be filed so long as there is another petition by the same petitioner which has not been dismissed or otherwise disposed of by final order. And if it is sought to remove the decree, the answer may well be that it is a perfectly good decree or, at least, that it is not void. The wife appeals to this court, and her appeal was supported by counsel appearing for the husband. Each asks for the help of the court in determining what the true position is if the court is not prepared to allow the appeal. Following upon the decree absolute each went through another ceremony of marriage. Thus the determination of the questions raised is of importance to others beyond the parties to the appeal. Those who went through ceremonies of marriage on the faith of the decrees wish to know what their position is. If the decree nisi and the decree absolute are void and of no effect they are not lawfully married; the questions raised are of public interest.

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[1] Ante, p. 281.

It was obvious from the commencement that on this appeal the interests of the wife and the husband were the same, and it was desirable that there should be argument upon the other side. Happily, the Queen's Proctor was represented by the Solicitor-General and Mr. Colin Duncan, and we had the advantage of their submissions. The Solicitor-General did not ask the court to say that the decree nisi was void or a nullity: he submitted that it was voidable, and that it (and the decree absolute) stood unless and until it was set aside. He submitted further that neither a court of first instance, nor the Court of Appeal, could make the amendment sought, or any amendment, after judgment was given, that is, after the decree nisi was pronounced, or after it was drawn up. It was not suggested that for this purpose there was any difference to be drawn between the decree nisi and the decree absolute.

The fact that the Solicitor-General did not submit that the decree was a nullity, or that it was void, does not absolve this court from the duty of considering the question. It is, I think, clear that neither Lord Gorell nor Lord Mersey, in cases to which I shall refer, would have given leave to amend if they had regarded the respective decrees as null and void. In *Hampson* v. *Hampson*[2] there had been a lawful marriage at a date earlier than, and at a place other than, that named in the petition and deposed to by the petitioner. The judge who heard the petition was satisfied that there had been a lawful marriage between the parties. When the application to amend was heard it was clear that the wrong date, and place, of the lawful marriage had been given. Likewise in the present case the parties were lawfully married. No one contests it. They had acquired the status of married persons, but the wife gave the wrong date and place of the lawful marriage. That constituted a failure to comply with a rule. It is something for which provision is made by R.S.C., Ord. 70, r. 1. In *Woolfenden* v. *Woolfenden*[3] Barnard J. drew attention to the distinction between failure to observe the terms of the statute and non-observance of a rule. Failure to comply with the provisions of the statute, he held, resulted in a decree being void, whereas failure to comply with a rule would make the decree only voidable.

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[2] [1908] P. 355.

The grant of a decree of dissolution puts an end to the status of married persons theretofore existing between the wife and the husband. In *Niboyet* v. *Niboyet*[4] Brett L.J. used these words: "Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates "by law a relation between the parties and what is called a "status of each. The status of an individual, used as a legal "term, means the legal position of the individual in or with "regard to the rest of a community." A decree granted by a competent court puts an end to that status. There is no suggestion of fraud in this case. It appears to me that it would be highly dangerous, and contrary to the expressed intention of Parliament, to hold that a decree is void merely because it gives the wrong date and wrong place of the marriage so that the commissioner has not the true date and place before him. The question here is whether the parties were lawfully married, and we know that they were. By section 13 of the Matrimonial Causes Act, 1950, either party may marry again after decree absolute (subject as is therein provided).

Section 13 (1) reads: "Where a decree of divorce has been "made absolute and either there is no right of appeal against "the decree absolute or, if there is such a right of appeal, the "time for appealing has expired without an appeal having been "presented or an appeal has been presented but has been dismissed, either party to the marriage may marry again." The section would be robbed of much of its force if it were open to a party to say that a decree was void because a wrong date had been given and the commissioner had not had before him the date of the ceremony of marriage. It is a question of status, not of ceremony. I agree with the submission of all the learned counsel who addressed us that the decree nisi, and decree absolute, granted in the present case cannot be regarded as void.

The case for amendment put forward by Mr. Lawrence on behalf of the wife and by Mr. Simon on behalf of the husband was that the court was entitled to amend its order after judgment had been given and entered, in some respects. Mr. Simon put it in this way: "The court cannot after judgment amend the "effective part of the order, that is, the status, the matrimonial "offence proved to have been committed, or the decree in so far "as it affects status, but, short of that, it can allow, and direct, "an amendment which is necessary or desirable in order to "correct the record so that it is in accordance with the facts, "provided that no injustice can be done to anyone thereby." The desirability of reference in the decree to the lawful marriage, instead of to a later ceremony, was emphasized, so as to avoid any question arising hereafter.

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[3] [1948] P. 27.

[4] (1878) 4 P.D. 1, 11.

We were referred to a number of authorities bearing upon this question. In *MacCarthy* v. *Agard* [5] the court gave leave to amend the title of the action and extended the time for appealing against the original judgment (see the footnote at the end of the report). The majority of the court held that there was no jurisdiction to amend the judgment. Scrutton L.J. did not take the same view as the other members of the court. It is interesting to note his observation in these words [6]: "I should be sorry to "think that the inherent power of the court is to be in any way "limited by rules."

In *Pearlman (Veneers) S.A. (Pty.)* v. *Bernhard Bartels* [7] the Court of Appeal, in approving the order of Slade J., went further. The name of the defendant was, by amendment, altered to Joseph Bartels, trading as Bernard Bartels. It was said that this was only an alteration in the title of the action and that the amendment could be made after judgment in accordance with the footnote to the report of *MacCarthy* v. *Agard*. The result of the amendment was that the plaintiffs could enforce the judgment in Germany. The Court of Appeal allowed this, though it was opposed by the defendant and though it adversely affected the rights of the defendant. It is only under the inherent jurisdiction of the court that this could be done. And it might be said that in the result there was more than an alteration in the title of the action. I read the words of Denning L.J., which show his view as to the power of the court in such a case. The learned Lord Justice said [8]: "An appeal comes to this court in which "it is said that these courts have no jurisdiction to amend a

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[5] [1933] 2 K.B. 417.

[6] Ibid. 422.

[7] [1954] 1 W.L.R. 1457; [1954] 3 All E.R. 659.

[8] [1954] 1 W.L.R. 1457, 1459.

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"judgment once it has been entered. Reliance was placed on "the decision of this court in *MacCarthy* v. *Agard*.[9] The distinction between that case and the present was drawn by "Slade J. in a judgment with which I fully agree. In *MacCarthy* "v. *Agard*[9] the plaintiff did not seek only to amend the name "or the description of the defendant, he sought to alter the very "judgment itself, which was in a special form applicable to a "married woman. He sought to get rid of the operative and "substantive part of the judgment. This court, by a majority, "held that that could only be done by way of appeal. Nevertheless, in the course of that case it appears that this court gave "leave to amend the title of the action. When the substantive "judgment is not being altered, but only the title of the action, "it is to my mind plain that this court has ample jurisdiction to "correct any misnomer or misdescription at any time whether "before or after judgment. That is what the master and the "learned judge have done in the present case." Hodson L.J., who agreed, based his judgment on R.S.C., Ord. 28, r. 12.

In the present case, that which we are asked to do is very much less. If we allow the amendments which the wife asks us to make we shall not affect or injure the rights of anyone. The petition was presented under section 1 of the Matrimonial Causes Act, 1950, and the claim for relief was based on the allegation that the husband "has since the celebration of the marriage "committed adultery." Under section 4 of the Act of 1950 it is the duty of the court to inquire, so far as it reasonably can, into the facts alleged. Under section 4 (2) (*a*), if the court is satisfied on the evidence that the case for the wife has been proved, the court shall pronounce a decree of divorce—subject as is in the section provided. The court must be satisfied that the wife and husband were lawfully married, for without that no decree dissolving a marriage can be pronounced. It must be taken that the commissioner was satisfied of this. True, the date and place of the marriage were wrongly stated in the petition —and in the evidence I suppose. Still the wife deposed to the fact that she was married to the husband and that she had four children by him. That was evidence before the commissioner and, moreover, it is common ground that the wife and the husband were in fact married—lawfully married—a year before the date given in the petition, and at another church. A decree nisi was granted by the commissioner: that was his judgment in the suit. The decree follows form 86 and it refers to the marriage had and solemnized on October 27, 1927, at St. Martin-in-the-Fields Parish Church between the wife and the husband.

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[9] [1933] 2 K.B. 417.

The Act does not require that the date and place of the marriage shall be stated; rule 4 calls for it. If the date and place of the marriage had been omitted and that which was dissolved was the marriage had and solemnized between the wife and the husband, I do not see that it could have been said that the decree was bad. In some cases it may happen that the party seeking relief—perhaps a refugee from the Continent—cannot give the precise date of the marriage ceremony, or the name of the church, and cannot obtain any record. Though it may not be easy to establish a valid marriage in such a case, if the wife succeeds in doing so, he or she is over the first hurdle. I infer from this that the date and place of marriage are not of vital importance. I do not mean that they are mere matters of form. Rule 4 of the Matrimonial Causes Rules requires that they shall be given, and when this is done and a certificate is produced, proof of a lawful marriage is comparatively simple. I see no reason why the court should not be satisfied upon evidence that the parties had been lawfully married even though it was impossible to ascertain the precise date of the marriage. The requirement of the rule as to place and date of the marriage goes to simplify proof, and, further, it helps in the keeping and checking of records. Important though compliance with the rule is, I do not regard the statement of the date or of the place of marriage as fundamental. As Mr. Simon put it, it ought not to be regarded as an effective part of the order (the decree). The court, before it grants a decree of dissolution, must be satisfied that the parties were lawfully married and that the husband had committed a matrimonial offence (or that there were other grounds for giving the relief sought).

In *Rooker* v. *Rooker*[10] it was impossible to prove the date or the place of the ceremony of marriage. The Judge Ordinary said: "Upon careful consideration of the evidence, I am of "opinion that the marriage was sufficiently proved. It appeared "from the statement of the petitioner's brother, James Rooker, "that in 1842 the petitioner was resident in America, and that "in 1843 he came back to this country with a lady whom he "introduced as his wife, and who is undoubtedly the respondent "in this suit. The history of this lady, from the time of her so

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[10] (1863) 3 Sw. & Tr. 526.

"coming to this country in 1843, is very clearly proved by the "evidence, which proves her name to be 'Sarah Massenburgh "'Rooker,' and which brings home to her the act of adultery, "upon which the suit is founded. It is also very clearly proved "by the affidavit of Mr. Mason that, in the year 1842, the law "in the State of Virginia did not require any religious ceremony "for the celebration of a valid marriage, and that the 'mere "'cohabitation of a man and woman who proclaim themselves, "'and are received in society as man and wife, constituted in "'the eye of the law a valid marriage.' Further, that in 1842 "there was 'no law in Virginia'"—this was a case in 1863— "'requiring any registry or record to be kept of a marriage,' "though he believed the law has been since altered. He then "states, that owing to the war now being carried on in Virginia, "the record of any religious ceremony of marriage, which might "have taken place, cannot be obtained. He goes on to state "that William Yates Rooker was many years ago, and, as he "believed, in 1842, rector of Christchurch, Winchester, Virginia, "and that for five years he and Sarah Massenburgh Rooker "resided together as man and wife in the parsonage, and were "received and acknowledged as such by himself and his family "and his whole congregation."

The Judge Ordinary said "A marriage is thus proved." That means a lawful marriage. The record of the proceedings in that case shows that the decree nisi was granted by Sir James Wilde, the Judge Ordinary, and that "the marriage had and solemnized "on the 1st day of February, 1842, at Christchurch, Kingston "Mathews, Virginia, . . . be dissolved." Obviously this was taken from the petition, for there was no proof of it.

The application which was before the learned President was to amend paragraph 1 of the petition and to make consequential amendments in the decree nisi and in the decree absolute. Lord Merriman was of opinion that there was no jurisdiction, or no power, to make such amendments and that he had no option but to dismiss the summons. There are, or there may be, two questions for consideration. The first: Is there power to allow the amendments sought after judgment has been given? And the second: If there is power, ought such a power to be exercised in this case? I now come to the cases dealing with amendment of decrees. The principle is the same as in any other class of case, though it may be said that from the point of view of the public it is more important in the public interest to allow an amendment which will put right a date referring to a marriage and thus to ensure a correct record than it is to amend a money judgment.

In *Hampson* v. *Hampson*,[11] Sir Gorell Barnes P. allowed amendments to be made in circumstances precisely similar to those in the case now under appeal. The report is short, and I propose to read the whole of it: "On March 13, 1899, the "petitioner (wife) was married by licence to the respondent at "the registrar's office in the district of Chorlton, in the county "of Lancaster, and on June 21, 1899, a form of marriage was "gone through by the petitioner and respondent at St. Mary's "Church, Birmingham. On October 1, 1906, the wife presented "a petition for dissolution of marriage. In that petition the "marriage was stated to have been celebrated at St. Mary's "Church, Birmingham, on June 21, 1899, and the decree nisi "and decree absolute which the Court subsequently pronounced "referred only to that ceremony of marriage. The petitioner "now moved that the decrees nisi and absolute might be rectified "by inserting therein the marriage at the registrar's office instead "of the subsequent ceremony of marriage in church. Notice of "this motion had been served on the respondent's solicitor. "The President said: 'I think the right thing to do is to amend "'the petition as well as the decrees made thereunder. On "'affidavit of service of notice of the motion, the petitioner may "'take the order for amendment of the petition and decrees; but "'no costs of this ought to be taxed against the respondent.'"

Lord Merriman, in his judgment, said [12] that he would most readily be guided by that decision, followed as it was to some extent by *Marshall* v. *Marshall*,[13] if he could satisfy himself that there was any ground upon which it could be supported. *Marshall* v. *Marshall* [13] came before Sir John Charles Bigham P. the following year. It is sufficient for my purpose if I read the headnote. "A wife having been married to her husband, first "by a declaration before witnesses in Edinburgh, and afterwards "at the Sheriff's Court, Edinburgh, obtained a decree *nisi* for "divorce. In the petition and the decree *nisi* only the second "ceremony was referred to. The Court allowed the petition and "the decree *nisi* to be amended by alleging also the first "ceremony, but without costs against the respondent. *Hampson* v. *Hampson* [14] followed." Thus Lord Mersey had cited to him the decision of Lord Gorell in *Hampson* v. *Hampson*.

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[11] [1908] P. 355.

[12] Ante, p. 279.

[13] (1909) 25 T.L.R. 716.

[14] [1908] P. 355.

The motion in *Marshall's* case was made by Mr. Victor Russell on behalf of the wife petitioner. Mr. Willis, who appeared for the respondent, did not consent, but did not dissent. The amendment asked for was allowed and it must be taken that the decision in *Hampson* v. *Hampson* was accepted as correct. Mr. Victor Russell told us that to the best of his recollection no question was raised upon it.

In *Reder* v. *Reder*[15] there was no application to amend, but the note of Hodson L.J., who was a member of the court, shows that *Hampson* v. *Hampson* was referred to, and the correctness of the decision does not appear to have been questioned. The commissioner had granted a decree in respect of whichever of two ceremonies of marriage was the effective one—and it was not easy to say which was. The Court of Appeal appears to have regarded the decree as a nullity: none the less the case was referred back to the commissioner, or it was suggested that he should reconsider it. I suppose there may have been a possibility of further evidence. The important feature of this case, which is incompletely reported, is that *Hampson* v. *Hampson*[16] was cited to the court.

There is an earlier authority, *Skeats* v. *Skeats and White*,[17] to which I should refer. The report reads: "In this case a "decree *nisi* for dissolution of marriage had been pronounced, but "by mistake the marriage was stated in the decree to have "taken place at the church of St. George, Hanover Square, "instead of at the church of the parish of St. Marylebone. *Dr.* "*Wambey* now moved the Court to order that the decree *nisi* "be amended by substituting 'the parish of St. Marylebone' for "'St. George, Hanover Square,' upon an affidavit shewing the "mistake; and he also moved that the decree *nisi*, when "amended, should be made absolute. The Judge Ordinary "granted the motion." There is nothing in the report to show who made the mistake.

The Judge Ordinary was Sir James Wilde, later Lord Penzance, and it was Lord Penzance who, in a different type of case, *Lawrie* v. *Lees*,[18] said: "I cannot doubt that under the original "powers of the Court, quite independent of any order that is "made under the Judicature Act, every Court has the power to "vary its own orders which are drawn up mechanically in the "registry or in the office of the Court—to vary them in such a

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[15] [1948] W.N. 238.

[16] [1908] P. 355.

[17] (1865) 35 L.J.P. & M. 47.

[18] (1881) 7 App.Cas. 19, 34, 35.

" way as to carry out its own meaning, and where language has " been used which is doubtful, to make it plain. I think that " power is inherent in every Court. Speaking of the Courts with " which I have been more familiar all my life, the Common Law " Courts, I have no doubt that that can be done, and I should " have no doubt that it could also be done by the Court of " Chancery. Moreover, having regard to the orders made under " the Judicature Act, I should myself have thought that it would " very well have come under those orders. I recommend your " Lordships not to make any variation of this order, but to affirm " it as it stands without prejudice to any such application to the " Court below."

I am satisfied that the court has power to amend the petition and the decrees nisi and absolute in the way sought in this case. It arises under the inherent jurisdiction of the court to do what is necessary and proper to correct an order so that the position under it shall be clear and free from ambiguity. It does not extend so far as to allow an amendment of the effective part of the order, for example, the question of status, or of proof of the matrimonial offence alleged, or of the decree itself in so far as it involves an alteration of status: those questions cannot be dealt with by an amendment of the proceedings after judgment. The date of the marriage dissolved is more in the nature of a recital, and so is the place of the marriage. If either of these is, or if both are, wrongly stated in the petition and in the decrees, the court can grant liberty to amend. That is in accord with the decision in *Hampson* v. *Hampson*,[19] which has never been called in question until now. It is a power, or a right, which ought not to be cut down. It enables the court, in a proper case, to put right something which is incorrectly stated, and to keep its records in line with the real position. It is discretionary in the court, and it ought not to be used if it can cause injustice to anyone, or if in any sense the exercise of it can offend against the public weal.

It is important to bear in mind that the commissioner intended to dissolve a lawful marriage, to put an end to the status of married persons which up to that time existed between the wife and the husband: the date on which they were married was of importance, but it was not vital to proof of marriage.

The submission of the Solicitor-General was that to amend in the way suggested would be to put the case on a false basis as

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[19] [1908] P. 355.

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the commissioner was never asked to consider the case on the footing of a lawful marriage in the year 1926. He submitted that the parties to the petition should be left to their own devices; and that the decree, being merely voidable, stands unless and until someone seeks to set it aside. It is not likely, I gather, that the Queen's Proctor will take any such step even if it is open to him to do so. Thus each party will remain in a state of uncertainty upon that argument. Either may take proceedings to set the decree aside as she, or he, feels inclined. Though I recognize that there may be an answer to any such step, still in one sense each remains in mercy of the other; and it is not only the wife and husband who are interested. Such a state ought not to be allowed to continue if it can be determined properly and in accord with the powers and practice of the court. It is desirable that both the wife and the husband should know where they stand once and for all. That can be done if the course adopted by Lord Gorell in *Hampson* v. *Hampson* [20] is followed in this case.

The Court of Appeal has wide powers given to it under R.S.C., Ord. 58, r. 4, of which I will read two parts: "The Court of "Appeal shall have all the powers and duties as to amendment "and otherwise of the High Court. . . . The Court of Appeal "shall have power to draw inferences of fact and to give any "judgment and make any order which ought to have been "made, and to make such further or other order as the case may "require." This rule shows that the Court of Appeal has wide powers. We know that the wife and the husband were lawfully married on October 8, 1926, and we are entitled to infer that the commissioner would have found that to be the date of the lawful marriage if the correct date had been given to him.

I draw attention also to R.S.C., Ord. 70, r. 1: "Non-"compliance with any of these rules, or with any rule of practice "for the time being in force, shall not render any proceedings "void unless the Court or a Judge shall so direct, but such "proceedings may be set aside either wholly or in part as "irregular, or amended, or otherwise dealt with in such manner "and upon such terms as the Court or Judge shall think fit." These rules apply to the practice in divorce by virtue of rule 80 of the Matrimonial Causes Rules of 1950. For the reasons I have given I have no doubt as to the power of the court to make the amendments desired. Though the wife brought the trouble upon herself, there are the interests of others, who acted on the faith of a decree of the court, to be considered. It is desirable in their interest, and in the public interest, that the questions raised should be dealt with and the position crystallized, and it is better that the records of the court should be put in order. I believe it to be of paramount importance that nothing should be said, or done, which would cut down the inherent power of the court. It was under that power that the amendment was allowed by Sir Gorell Barnes P. in *Hampson* v. *Hampson*,[20] and I am satisfied that he was entitled to make the order which he made.

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[20] [1908] P. 355.

In the case under appeal it seems to me that a slightly different form may be adopted, and it arises from a suggestion made by Morris L.J. during the argument. The references in the decree nisi and in the decree absolute to the date and place of the marriage should be struck out, and there should be a note upon each of these decrees saying that the words were struck out by order of the Court of Appeal on the 27th day of July, 1955, the court being satisfied that the lawful marriage between the wife and the husband was solemnized on the 8th day of October, 1926, at St. Paul's Church, Knightsbridge. This would solve the difficulties which have arisen; it would overcome the point raised by the Solicitor-General that to make the amendments sought by the wife would create a false position in that the commissioner had not considered a marriage in the year 1926: and I understood Mr. Duncan to agree that it could not hurt anyone.

It may be said that the wife is not deserving of much sympathy, and that it is not easy to accept all that she says in her affidavit, but others are involved. It is better that they should know what their position is, and, in my view, the court ought to help as far as it can properly do so. I am in favour of allowing the appeal to the extent I have stated.

In the circumstances, it does not appear to me to be necessary to deal with the motion of the husband, except that it would appear that it is too late by reason of the terms of section 31 (1) (*e*) of the Supreme Court of Judicature (Consolidation) Act, 1925. This seems to me to be an additional reason for allowing the amendments sought if the court has the power to allow them—as otherwise there would be no opportunity of correcting the record. I should say that there might be one or two other verbal amendments necessary in the decrees if the course which I have suggested is adopted.

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[20] [1908] P. 355.

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Hodson L.J. Upon a summons by the wife (who had obtained a decree absolute of divorce from her husband) for leave to amend the petition, decree nisi and decree absolute, the President dismissed the summons, holding that he had no jurisdiction to order the amendments which were sought. The original summons and the appeal from its dismissal were supported by the husband, and on the appeal the Solicitor-General has appeared on behalf of the Queen's Proctor as amicus curiae.

By her petition the wife averred that she was married to the husband on October 27, 1927, at St. Martin-in-the-Fields, that the husband had committed adultery, and she prayed for a decree on that ground notwithstanding her own admitted adultery. On May 15, 1953, His Honour Judge Dale, as special commissioner, pronounced a decree nisi of divorce in the exercise of the court's discretion and the decree was made absolute on June 27, 1953. In her affidavit in support of the summons the wife disclosed that she was lawfully married to the husband on October 8, 1926, at St. Paul's, Knightsbridge, so that the later ceremony was of no effect. By the amendment it was sought to substitute in the petition, and in the decrees, wherever a reference to the 1927 marriage appeared, reference to the valid and effective ceremony of 1926. There was also before the court a motion by the husband for leave to appeal against the decree absolute.

In considering the question whether there is jurisdiction to amend a judgment or order save by way of appeal or under the slip rule, which has no application to this case, it is first necessary to consider whether the judgment or order is itself a nullity. The decree nisi is, I think, for this purpose, on the same footing as the decree absolute (both of which are in the form commonly used since the Matrimonial Causes Act, 1857, was passed), and refers specifically to the ceremony of marriage between the parties, which in this case, according to the evidence of earlier marriage now before the court, was a mere ceremony having no legal effect. The decree on the face of it is good, but, if the only effect of the decree were to operate upon this idle ceremony and not upon the marriage status, it would be a nullity. In such a case it would not be capable of amendment and there would be no divorce.

Mr. Simon, however, on behalf of the husband, has argued that the decrees are not nullities but, at worst, voidable, so that this obstacle does not stand in the way of this amendment. The Solicitor-General did not resist this argument which is, I think,

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well founded. The term " dissolution " is inappropriate to the concept of a ceremony. What is dissolved is the status, not the ceremony. This is the subject-matter of the jurisdiction conferred upon the court by the statute, now the Matrimonial Causes Act, 1950. By section 1 a petition for divorce may be presented to the High Court either by the husband or the wife on certain grounds. The words " husband and wife " connote a marriage. By section 4, " if the court is satisfied . . . that—(*a*) the case " for the petition has been proved," subject to certain provisos, the court is bound to pronounce a decree.

Brett L.J., in *Niboyet* v. *Niboyet*,[21] showed the nature of the subject-matter with which the court is called upon to deal when he said: " Marriage is the fulfilment of a contract satisfied by " the solemnization of the marriage, but marriage directly it " exists creates by law a relation between the parties and what " is called a status of each. The status of an individual, used " as a legal term, means the legal position of the individual in or " with regard to the rest of a community. That relation between " the parties, and that status of each of them with regard to the " community, which are constituted upon marriage are not " imposed or defined by contract or agreement but by law."

In *Harvey* v. *Farnie* [22] Cotton L.J. pointed out: " the word " ' marriage ' is used in two senses. It may mean the solemnity " by which two persons are joined together in wedlock, or it may " mean their status when they have been so joined." The latter is the primary sense in which the word is used, and it seems to me that, there being no question but that the parties were husband and wife when the petition was presented, the decree of divorce operated as a proper judgment on the subject-matter of the decree, namely, the marriage in that sense and, accordingly, it is not void ab initio, there being no other ground upon which it can be said to be void save that the ceremony alleged and proved was not that which marked the inception of the marriage. If the decree absolute is not a nullity but only voidable, it is difficult to see how it can now be avoided. Other parties having acquired rights under it the decree would appear to be unassailable. See the judgment of the Privy Council in *McPherson* v. *McPherson*.[23] Save in exceptional circumstances, such as where a respondent has not had time or opportunity to appeal against a decree nisi, the pronouncement of the Privy

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[21] 4 P.D. 1, 11.

[22] (1881) 6 P.D. 47.

[23] [1936] A.C. 177; 52 T.L.R. 166.

Council on this topic would appear to be of general application. See *Wiseman* v. *Wiseman*.[24]

It is said that, although there is no slip, yet the court can, under its inherent jurisdiction, correct the errors which are now shown to have appeared upon the face of the petition and the decrees. That the court has so acted in the past is shown by *Hampson* v. *Hampson*,[25] which has already been cited by my Lord, a decision of Sir Gorell Barnes P., which was followed by Sir John Charles Bigham P. in *Marshall* v. *Marshall*,[26] also cited by my Lord, both of which cases are in principle indistinguishable from the present case, and, if rightly decided, should have been followed by Lord Merriman P. He felt unable to see on what principle these decisions could be supported, and decided accordingly that he could not follow them. It is to be observed that in each of those cases the petitioner's application was acceded to without opposition, so that the court did not have the benefit of argument on the other side.

The limits of the inherent jurisdiction of the court to amend its judgments, apart from clerical slips or omissions, have been laid down by authority, for, generally speaking, when an order or judgment of the High Court has once been perfected, the court had no jurisdiction to alter it: see *In re Suffield and Watts, Ex parte Brown*.[27] In *Lawrie* v. *Lees*[28] Lord Penzance said: "I "cannot doubt that under the original powers of the court, quite "independent of any order that is made under the Judicature "Act, every court has the power to vary its own orders which are "drawn up mechanically in the registry or in the office of the "court—to vary them in such a way as to carry out its own "meaning, and where language has been used which is doubtful, "to make it plain." In *Skeats* v. *Skeats and White*,[29] Lord Penzance himself, when Sir James Wilde, the Judge Ordinary, had previously acted in this sense. The report of that case reads as follows: "A decree nisi by mistake mis-stated the place where "the marriage was solemnized. On motion, the court ordered it "to be amended. In this case a decree nisi for dissolution of "marriage had been pronounced, but by mistake the marriage "was stated in the decree to have taken place at the church of "St. George, Hanover Square, instead of the church of the "parish of St. Marylebone. Dr. Wambey now moved the court

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[24] [1953] P. 79; [1953] 1 All E.R. 601.

[25] [1908] P. 355.

[26] 25 T.L.R. 716.

[27] (1888) 20 Q.B.D. 693.

[28] 7 App.Cas. 19, 34.

[29] 35 L.J.P. & M. 47.

"to order that the decree nisi be amended by substituting 'the "'parish of St. Marylebone' for 'St. George, Hanover Square,' "upon an affidavit showing the mistake; and he also moved that "the decree nisi, when amended, should be made absolute. The "Judge Ordinary granted the motion."

In 1885, in *In re Swire*,[30] Cotton, Lindley and Bowen L.JJ. followed Lord Penzance's opinion. Lindley L.J. said: "It "appears to me, therefore, that if it is once made out that the "order, whether passed and entered or not, does not express the "order actually made, the court has ample jurisdiction to set "that right, whether it arises from a clerical slip or not." Bowen L.J. said: "An order, as it seems to me, even when "passed and entered, may be amended by the court so as to "carry out the intention and express the meaning of the court "at the time when the order was made, provided the amendment "be made without injustice or on terms which preclude "injustice." This decision was approved by Lord Watson in the House of Lords in *Hatton* v. *Harris*,[31] and followed by the Court of Appeal in *MacCarthy* v. *Agard*.[32]

To the same effect is *Preston Banking Co.* v. *William Allsup & Sons*,[33] where Lindley L.J. stated the general rule as follows: "In my opinion, it is of the utmost importance, in order that "there may be some finality in litigation, that when once the "order has been completed it should not be liable to review by "the judge who made it." Lord Halsbury had in the same case said: "Even when an order has been obtained by fraud, it has "been held that the court has no jurisdiction to rehear it. If "such a jurisdiction existed it would be most mischievous. The "fact that in the present case the application to rehear is made "to the particular judge who made the order is immaterial; for "if one judge can rehear the order another can. Any application "which may be made to the Vice-Chancellor for an order in the "nature of a supplemental order is, of course, still within his "jurisdiction; but he has no jurisdiction to rehear or alter this "order." A. L. Smith L.J. gave judgment to the same effect.

In *MacCarthy* v. *Agard*[34] judgment had been obtained against a widow in the "*Scott* v. *Morley*" form, in the belief which she had induced that she was a married woman. This form of judgment was applicable only if this was her status. The judge in chambers discharged the judgment, but the Court of Appeal by

[30] (1885) 30 Ch.D. 239, 246, 247.

[31] [1892] A.C. 547.

[32] [1933] 2 K.B. 417.

[33] [1895] 1 Ch. 141, 144.

[34] [1933] 2 K.B. 417.

a majority reversed his decision, holding that the jurisdiction of the court to alter a judgment did not extend to cases where the intention of the court was carried out by the order. The court did, however, alter the title of the action. This case was followed in the Court of Appeal in *Pearlman (Veneers) S.A. Proprietary Ld.* v. *Bernhard Bartels*,[35] where a judgment had been obtained in England, but it was thought that the defendant's first name was inaccurately given, and that enforcement of the judgment in Germany might be difficult unless the first name were corrected, although the surname was correct. The court allowed the title to be altered by amending the first name of the defendant, but did not, in my opinion, go further than the manifest intention of the court, which was to give judgment against a particular defendant. Both members of the court pointed out that no alteration of the judgment was being made.

Here the commissioner addressed himself to certain facts and, he having found the necessary facts proved, the judgment carried out his intention and is thus unalterable, in my opinion, under the inherent jurisdiction of the court as applicable to this situation and as laid down by authorities binding upon this court. If he had been asked what his intention was, I think he would have surely answered that he intended to dissolve the marriage of the petitioner and respondent. This he did. If he had been asked the further question—to what ceremony was your mind directed?—he must have answered to the ceremony of 1927. Of the 1926 ceremony he had never heard, and it cannot, therefore, have been his intention to make any order relating thereto as being the inception of the marriage.

He had before him evidence of marriage; the parties lived together and had children; it is true it is now shown that the evidence about the marriage ceremony was inaccurate evidence, but it does not appear to me to be possible for the court to amend the record of its judgment when it is informed that some of the information on which it acted was wrong without, as the Solicitor-General put it, distorting history. Where the court has made the order it intended to make, the judgment must stand until set aside on appeal or by action brought for the purpose. The court cannot otherwise eat its own words simply because the evidence upon which it acted is shown to be wrong, whether the error is brought about deliberately or by accident.

To amend the petition upon which the decree was pronounced

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[35] [1954] 1 W.L.R. 1457.

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must make it appear as if the wife had presented a case different from that which she actually put forward at the hearing. Judgment having been given, I think it is too late for such an amendment. In my opinion, therefore, *Hampson's* case[36] was wrongly decided, and neither the petition upon which the suit was founded nor the decrees nisi and absolute can be altered. I would dismiss the appeal.

The application of the husband for leave to appeal cannot be entertained. The Judicature Act, 1925, s. 31 (1), provides as follows: " No appeal shall lie (*e*) from an order absolute for the " dissolution or nullity of marriage in favour of any party who " having had time and opportunity to appeal from the decree nisi " on which the order was founded, has not appealed from that " decree." The husband was served with the petition and had the opportunity of reading it. If he did not do so he cannot say that he had no opportunity to appeal against the decree nisi. The question of time does not arise. Moreover, according to the ordinary rules governing appeals he could not be permitted to give fresh evidence of facts which were at all material times within his knowledge. The motion of the husband should also be dismissed.

MORRIS L.J. When the petition for dissolution of marriage was filed in January, 1953, the petitioner was in fact the lawful wife of the respondent. She had had that status since October 8, 1926. In her petition, however, she gave the date as October 27, 1927, and she wrongly stated the church and parish where the marriage had been solemnized. Upon the hearing of the petition the learned commissioner found that the contents of the petition had been proved. Amongst other matters he accordingly found that the petitioner was the wife of the respondent. He was satisfied in regard to the ground for divorce that was alleged. This was, in the language of section 1 (1) of the Matrimonial Causes Act, 1950, that the respondent had " since the celebration " of the marriage committed adultery." The wife having herself been guilty of adultery the commissioner, in the exercise of his discretion, pronounced a decree nisi of divorce. He was therefore satisfied (a) that the parties before him were husband and wife, and (b) that they had been so since October 27, 1927, as a result of a church marriage ceremony of that date. There is complete confirmation as to (a). If, however, correct evidence had been

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[36] [1908] P. 355.

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placed before him he would have been satisfied that the parties had in fact been husband and wife since October 8, 1926, as a result of a church marriage ceremony of that date. There is no reason in this case to believe, even though it was one in which the wife asked for the exercise of the court's discretion, that if the commissioner had known that the parties had been husband and wife from October 8, 1926, and not only from October 27, 1927, any different result would have followed. No one has so suggested.

In *McPherson* v. *McPherson*[37] a decree of divorce was pronounced after a trial during which a judge, albeit unconsciously, had denied his court to the public in breach of their right to be present. In the course of delivering the judgment of their Lordships in the Privy Council, Lord Blanesburgh said: "Here "their Lordships are dealing with a decree pronounced after "a serious trial free from every other defect in procedure, and "one entered and remaining on the court files as regular in every "respect. To say that such a decree is void would seem to be "out of the question. If the law were so to treat it, the remedy "would be far worse than the disease it was designed to cure. "To say that it is voidable states a result which, their Lordships "think, entirely meets the case."

In the present case there was a "serious trial." There was no defect in the procedure as such. The decrees are complete and regular on the face of them. In these circumstances I do not think that the decrees are void or are to be treated as nullities. This has not been suggested either by the parties or in the submissions presented for the assistance of the court on behalf of the Queen's Proctor. When the decree was made absolute the marriage was dissolved. The wife became a feme sole. The parties were free to marry again.

Mr. Simon submitted that the effect of a decree of divorce is to dissolve a marriage between husband and wife in the sense of putting an end to their married status. I think that this is a valid submission. It is not the mere celebration or solemnization of marriage with which the court is concerned but rather with the married state or status. An ordinary contract may be rescinded or terminated by mutual agreement. It is otherwise with a contract of marriage duly celebrated or solemnized. Thus, in *Niboyet* v. *Niboyet*[38] Brett L.J. said: "Marriage is the "fulfilment of a contract satisfied by the solemnization of the

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[37] [1936] A.C. 177, 203, 204.

[38] 4 P.D. 1, 11.

"marriage, but marriage directly it exists creates by law a "relation between the parties and what is called a status of each. "The status of an individual, used as a legal term, means the "legal position of the individual in or with regard to the rest "of a community. That relation between the parties, and that "status of each of them with regard to the community, which are "constituted upon marriage are not imposed or defined by "contract or agreement but by law." The validity of the passage which I have cited has not, I think, been questioned.

The position in the present case, as I see it, is that the commissioner thought that the parties were husband and wife, and, because of the misconduct of the husband, he pronounced a decree of dissolution of marriage. It is now known, and it is not disputed, that in all this he was correct. It might happen that two people marry and are then divorced and then marry again. But in ordinary cases there is only one marriage. In any case there can, of course, at any one time, only be one subsisting marriage between two people. There was only ever one marriage in this case, though there were two marriage ceremonies.

The Matrimonial Causes Rules, 1950 (see rr. 3, 4, 6) make it obligatory for a petitioner to state, amongst many other matters, the place and date of the marriage. Rule 40 (4) provides that: "A certificate in accordance with Form 15 or "Form 16, whichever is appropriate, that the decree has been "made absolute shall be prepared and filed by the registrar. "The certificate shall be authenticated by fixing thereto the seal "of the registry." Form 16 includes the following words: "Referring to the decree made in this cause on the day "of 19 , whereby it was decreed that the marriage had "and solemnized on the day of 19 , at between " the petitioner and the respondent be dissolved by "reason that unless sufficient cause be shown to the court "within weeks from the making thereof why the said decree "should not be made absolute, and, no such cause having been "shown, it is hereby certified that the said decree was on "the day of 19 , made final and absolute and that "the said marriage was thereby dissolved." The concluding words—"and that the said marriage was thereby dissolved"—are not words which denote that the court is dissolving some one selected marriage between the parties, but rather that it is dissolving *the* existing marriage between the parties, which marriage resulted from a recited ceremony that took place on a named date at a named place.

In the present case the parties were husband and wife: the husband had been guilty of adultery: because of this the commissioner decided to dissolve the marriage. He should, however, have been given the correct date and place of the ceremony which brought about the married state of the parties. If he had been, his conclusion would have been no different. In the result a decree which is not a nullity came into being. It recites the incorrect information as to the marriage ceremony which was given to the court. The decree was made final and absolute on June 27, 1953. The decree absolute recites the same incorrect information. Even if either party could, for any reason, bring some proceedings to avoid the decrees, neither party wishes to do so. Each has remarried.

It is provided by section 13 (1) of the Matrimonial Causes Act, 1950, that where a decree of divorce has been made absolute and the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, either party to the marriage may marry again. It is provided by section 31 (1) (*e*) of the Supreme Court of Judicature (Consolidation) Act, 1925, as follows: "No appeal shall lie (*e*) "from an order absolute for the dissolution or nullity of marriage "in favour of any party who having had time and opportunity to "appeal from the decree nisi on which the order was founded, "has not appealed from that decree." If the husband had time and opportunity to appeal from the decree nisi, then it follows that, as he did not so appeal, no appeal lay from the decree absolute. I cannot but think that the husband had both time and opportunity to appeal. If he only read the petition against himself in a casual and not careful manner, this denotes not that he was denied opportunity but rather that he did not avail himself of opportunity. The wife could hardly appeal against a decree nisi in her favour which was pronounced in the way in which she sought: and in any event she had "time and "opportunity."

In all these circumstances what, then, is the present position? The decrees stand. Their existence lead to the forming of other marriage unions. The decrees cannot, in my judgment, be the subject of any appeal. The possibility of any proceedings instituted with the object of avoiding the decrees is, in my judgment, shadowy and remote. Now that the court has been informed, as most properly it was informed, of the fact that incorrect evidence as to the date and place of the marriage was originally given to the court and has been embodied in the court

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decrees, must those decrees be left as they are or is there method by which they may be amended? This raises the question as to the powers of the court to make amendments in the terms of its orders and judgments. In addition to powers resulting from rules of court, it is clear that there are necessary powers which are inherent in the jurisdiction of the court. It would, I think, be undesirable to limit the scope of these powers as a result of any words which describe them. I respectfully agree with what was indicated by Evershed L.J. in *Meier* v. *Meier*[39] when he said: "I prefer not to attempt a definition of the extent of the "court's inherent jurisdiction to vary, modify or extend its own "orders if, in its view, the purposes of justice require that it "should do so."

Without in any way purporting to categorize and certainly without indicating any limits, a few illustrations in regard to the court's powers may be mentioned. (a) If there is some clerical mistake in a judgment or order which is drawn up there can be correction under the powers given by R.S.C., Ord. 28, r. 11, and also under the powers which are inherent in the jurisdiction of the court. (b) If there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under Ord. 28, r. 11, and under the court's inherent powers. (c) If the meaning and intention of the court is not expressed in its judgment or order then there may be variation. In *Lawrie* v. *Lees*[40] Lord Penzance said: "I cannot "doubt that under the original powers of the court, quite "independent of any order that is made under the Judicature "Act, every court has the power to vary its own orders which "are drawn up mechanically in the registry or in the office of "the court—to vary them in such a way as to carry out its own "meaning, and where language has been used which is doubtful, "to make it plain. I think that power is inherent in every "court."

To the same effect were the judgments in *In re Swire, Mellor* v. *Swire*.[41] Lindley L.J. said: "if an order as passed and "entered does not express the real order of the court, it would, "as it appears to me, be shocking to say that the party aggrieved "cannot come here to have the record set right," and "It "appears to me, therefore, that if it is once made out that the "order, whether passed and entered or not, does not express

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[39] [1948] P. 89, 95.

[40] 7 App.Cas. 19, 34.

[41] 30 Ch.D. 239, 246.

"the order actually made, the court has ample jurisdiction to "set that right, whether it arises from a clerical slip or not."

(d) If it is suggested that a court has come to an erroneous decision, either in regard to fact or law, then amendment of its order cannot be sought, but recourse must be had to an appeal to the extent to which appeal is available. (e) If new evidence comes to light and can be called, which no proper and reasonable diligence could earlier have secured, then likewise amendment of a judgment cannot be sought: there might be an appeal and an endeavour to come within the rules and the well-settled principles relating to applications in such circumstances to adduce fresh evidence. (f) If a party is wrongly named or described, amendment may in certain circumstances be sought. See *Pearlman (Veneers) S.A. (Pty.) Ld.* v. *Bernhard Bartels.*[42] In that case Denning L.J. pointed to the distinction between seeking to get rid of the "operative and substantive" part of a judgment and the correction of a misnomer or misdescription.

An instance of an attempt to change the substantive part of a judgment is *MacCarthy* v. *Agard.*[43] In that case the judgment was in the special form applicable to a married woman. The judgment had been intentionally given in that form. Upon ascertainment of the real facts it appeared that the defendant was not a married woman and accordingly the judgment should not have been in the special form (the *Scott* v. *Morley* form). The difference was clearly one of substance. Amendment of the judgment was therefore not possible, as this court held. The proper course to adopt was to appeal.

(g) A court may in the exercise of its inherent jurisdiction in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment. An example of this would be where it comes to the knowledge of a court that a person named as a judgment debtor was at all material times, at the date of the writ and subsequently, non-existent. (See *Lazard Bros.* v. *Midland Bank Ld.*[44]) Under the Rules of the Supreme Court powers are given under certain circumstances to set aside judgments obtained in default. (h) Even if a judgment has been obtained by some fraud or false evidence the court cannot amend the judgment: there must be either an appeal or there must be an action to set aside the judgment: the particular circumstances may denote what procedure is appropriate; but a power to amend cannot be invoked.

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[42] [1954] 1 W.L.R. 1457.

[43] [1933] 2 K.B. 417.

[44] [1933] A.C. 289; 49 T.L.R. 94.

What, then, is the principle which applies where a court dealing with a marriage has been given the wrong date and place of its celebration and has incorporated the errors in its decree? A case can be imagined where a petitioner, in all innocence, mistakenly gives the wrong date of a marriage, first in a petition, and later in evidence. In ordinary circumstances a sight of a copy extract from the marriage register would lead to the discovery of the mistake. But if the mistake were for some reason not found out and if in the result decrees nisi and absolute referred to a marriage had and solemnized say on June 1, 1930, when the correct date was June 1, 1929, can the decrees on later application be amended? If they cannot, the position would be very unfortunate. The decrees themselves would be valid and effectual though the court would have been informed of an error, not in the operative and substantive part of the decrees, but, in what is really a recital which identifies the marriage which the court has dissolved.

In the illustration which I have given it can be said that the intention of the court was to dissolve the marriage whatever was the true date of its solemnization and that the date in the decrees can be amended so as to give proper effect to the real intention of the court. If the court, in the circumstances I have postulated, is powerless to act, it would seem as though the court was enslaved by its own decree. Where a court has decided an issue and the decision of the court is truly embodied in some judgment or order that has been made effective, then the court cannot reopen the matter and cannot substitute a different decision in place of the one which has been recorded. Those who seek to alter must in those circumstances invoke such appellate jurisdiction as may apply. But if a case arises where in the interests of accuracy it seems desirable to amend some part of a judgment, other than its operative and substantive part, it would seem to be regrettable if the inherent powers of the court were limited or confined. The powers extend, in my judgment, to enable a court so to amend a judgment that it carries out the intention of the court. Particular words and particular forms (unless specified by the legislature) are the servants of the law and not its master.

I respectfully express my concurrence with the learned President as to the importance of a faithful observance of the provisions of the Matrimonial Causes Rules, 1950. Mr. Simon submitted that certain rules (rule 4 (1) (*a*) and rule 40 (4)) are ultra vires. I am not prepared to accept this or to acknowledge any doubt as to their validity. Furthermore, the desirability of a careful following of the provisions of the rules is amply demonstrated by the situation in this case. Because of non-compliance with one of the rules the petitioner has involved herself and also the respondent in anxieties, uncertainties and expense. Two other people are also closely and directly concerned. There was, I consider, a non-compliance with rule 4 (1) (*a*). It is provided that the place and date of the marriage must be stated in the petition. In fact a wrong date and a wrong place were given. The wrong date and place are, as a result, included not only in the decree nisi but also in the decree absolute which must (following rule 40 (4)) be certified in manner prescribed by Form 16 of Appendix III to the rules, to which I have referred.

In my judgment, if amendment is within the power of the court it is desirable in this case, now that the true date and place of the marriage of the parties are ascertained, to make amendment so that (a) the decree of the court will not continue to include an erroneous recital and (b) so that all uncertainty may, if possible, be removed.

I have come to the conclusion that it is within the power of the court to make amendment. I consider that what the learned commissioner intended to do was to dissolve the marriage that was subsisting. If an error of a few days had been made in giving the date of the marriage, I cannot think that the decision of the court to end the marriage would have been in any way affected. There is no reason in this case to think that any different principle applies even though, under the exceptional circumstances set out in the wife's affidavit, both date and place of the marriage were wrongly given. The court decided to end the marriage. The reason why the decrees recite the 1927 ceremony is that the court thought that it was by reason of that ceremony that the marriage began. The court never knew of the 1926 ceremony. Now that the court knows of it, and of its significance, it seems to me that in order that the decrees may express the intention of the court, which was to dissolve the marriage, the decrees can be amended so that they accurately express and carry out the intention of the court. To do this the decrees should not contain any erroneous recital or any errors as to the date and place of the marriage ceremony. There was only one marriage, and there could only have been one marriage, subsisting at the date of the hearing before the learned commissioner. It was that marriage which he intended to dissolve. So that his intention may not be inaccurately expressed, any wrong references in regard to the marriage should be corrected. In my judgment the court has the power to make such corrections, and I think that it was this power that was exercised in *Hampson* v. *Hampson*[45] and in *Marshall* v. *Marshall*.[46] It would not, however, in my view, be right to make any amendment which would make it seem, or would suggest, that the learned commissioner had been satisfied in regard to some fact that was not mentioned to him. The wording of the decree nisi can, I think, be amended by omitting reference to the date and place of the marriage. In regard to the decree absolute, inasmuch as Form 16 has the sanction of the rules, and inasmuch as the form requires the date and place of the marriage to be inserted, the court could not depart from what is specified unless the court is endowed with power so to do. But, in my judgment, the court is given power by Ord. 70, r. 1.

In this case, because of the non-observance by the petitioner of the requirement of rule 4 of the Matrimonial Causes Rules, that the date and place of a marriage must be given (which must mean the correct date and place), a state of affairs has been brought about which enables the court to exercise the powers given to it by Ord. 70, r. 1. For the reasons I have given I consider that amendment of the decrees on the lines I have indicated can be made.

Appeal allowed.
Motion by husband for leave to appeal dismissed.

Solicitors: *Gordon Dadds & Co.; Charles Russell & Co.; Queen's Proctor.*

A. W. G.

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[45] [1908] P. 355.

[46] 25 T.L.R. 716.

1955
April 29;
May 16,
17. 24.

Lord Merriman
P. and
Davies J.

PILCHER *v.* PILCHER.

Husband and Wife — Maintenance — Justices — Order made outside United Kingdom—Registered in court of summary jurisdiction in England — Jurisdiction limited to enforcement — Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 33), *ss.* 1, 4, 6.

A wife obtained a maintenance order in the magistrates' court, Gibraltar, which was later registered in a court of summary jurisdiction in England under the provisions of section 1 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, after the husband had come to England. The order was later revoked by the English court on the application of the husband:—

Held, on appeal, that the provision in the subsection that from the date of registration "all proceedings may be taken on such "order as if it had been an order originally obtained in the court "in which it is so registered, and that court shall have the power "to enforce the order accordingly" is limited to enforcement and does not permit of complaints for alteration, variation or discharge of orders registered by virtue of that section.

The provisions in section 4 (6) of the Act for the variation and rescission of a provisional order for maintenance which has been confirmed by an English court of summary jurisdiction under that section, distinguished.

Appeal from a court of summary jurisdiction.

On March 17, 1952, while the husband was resident in Gibraltar and the wife in La Linea, Spain, the magistrates' court at Gibraltar adjudged that the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife and child. and ordered him to pay her, through the clerk of the court, £2 a week for herself and £1 a week for the child.

The husband returned to England not long after the order was made; the wife and child continued to live in La Linea. On July 13, 1953, the order was registered at the West London magistrates' court. On July 20, 1953, the husband applied by complaint to that court for the revocation of the order, alleging that the wife had refused a bona fide offer of reconciliation and that "she resides in Spain and not in Gibraltar, and the Spanish "Government have refused me a residence permit." The complaint was transferred to the domestic proceedings court at Chelsea, where it was adjourned on August 18, 1953, and again on September 15, 1953. On the latter date the following note was made of what took place: "Counsel for applicant. Summons "has not been served. ? [sic.] jurisdiction in any event. *Not "served.*" Both the wife and her lawyer in Gibraltar had received from the husband's solicitor notice of the proceedings and of the date of the hearing and a copy of the summons was also sent to the Gibraltar lawyer. There was, however, in the strict sense no service of the summons on the wife, since there was no means whereby service of summary proceedings could be effected out of the jurisdiction.

The case was heard at Chelsea before a differently constituted court on November 3, 1953, and the order was revoked. The nature of the contentions is indicated in the judgment. The magistrate presiding on November 3, 1953, later had doubts as to the validity of the order; on November 9, 1953, he caused a letter to be written to the husband's solicitors, and on November 10, 1953, he added an entry to the minute of adjudication of November 3, 1953, in these terms: "Dealt with in error. Not "served and no jurisdiction." This entry was made on his own initiative and without reassembling the other magistrates who had composed the court.

Applications to enforce arrears under the original order were made to the West London court on the complaint of the wife, in February, 1954, and on the complaint of the chief clerk of the court in November, 1954. An order was made at the February hearing in respect of arrears accrued due prior to November 3, 1953: the application in November, 1954, was dismissed. The magistrate on both occasions held that the order of November 3, 1953, was binding notwithstanding the entry added on November 10, 1953, to the minutes.

The wife appealed against the order of November, 1954. Leave was given at the hearing to appeal also against the orders of February, 1954, and November 3, 1953.

At the hearing of the appeals the fundamental question concerned the validity of the order of November 3, 1953. The finding of the magistrate that that order was unaffected by the addition to the minutes was upheld. The facts are set out more fully in the judgment of the court.

Melford Stevenson Q.C. and *Joseph Jackson* for the wife appellant.

Scott Henderson Q.C. and *Eric Stockdale* for the husband respondent.

Argument was upon the construction of section 1 (1) of the Act of 1920 and is referred to in the judgment.

Cur. adv. vult.

1955

PILCHER
v.
PILCHER.

LORD MERRIMAN P. read the judgment of the court: This appeal relates to certain proceedings in magistrates' courts in the Metropolitan Area arising out of the Maintenance Orders (Facilities for Enforcement) Act, 1920,[1] hereafter referred to as the 1920 Act. It originated with a notice of appeal by a wife dated February 1, 1955, from an order made by Mr. Guest on November 30, 1954, at the West London magistrates' court, whereby he dismissed an application for the enforcement of arrears alleged to be due under a maintenance order made in the magistrates' court of Gibraltar on March 17, 1952. These are referred to hereafter as the Gibraltar court and the Gibraltar order. This order was registered at the West London court on July 13, 1953, under section 1 (1) of the 1920 Act.

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[1] Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 1: "(1) Where a maintenance order has, "whether before or after the passing "of this Act, been made against any "person by any court in any part of "His Majesty's dominions outside "the United Kingdom to which this "Act extends, and a certified copy of "the order has been transmitted by "the governor of that part of His "Majesty's dominions to the Secretary "of State, the Secretary of State shall "send a copy of the order to the "prescribed officer of a court in "England or Ireland for registration; "and on receipt thereof the order "shall be registered in the prescribed "manner, and shall, from the date of "such registration, be of the same "force and effect, and, subject to the "provisions of this Act, all proceedings may be taken on such order as "if it had been an order originally "obtained in the court in which it is "so registered, and that court shall "have power to enforce the order "accordingly.

"(2) The court in which an order "is to be so registered as aforesaid "shall, if the court by which the "order was made was a court of "superior jurisdiction, be the Probate, Divorce and Admiralty Division of the High Court . . . and, if "the court was not a court of superior "jurisdiction, be a court of summary "jurisdiction."

S. 4: "(1) Where a maintenance "order has been made by a court in a "part of His Majesty's dominions "outside the United Kingdom to "which this Act extends, and the "order is provisional only and has no "effect unless and until confirmed by "a court of summary jurisdiction in "England or Ireland, and a certified "copy of the order, together with the "depositions of witnesses and a statement of the grounds on which the "order might have been opposed has "been transmitted to the Secretary of "State, and it appears to the Secretary of State that the person "against whom the order was made is "resident in England or Ireland, the "Secretary of State may send the "said documents to the prescribed "officer of a court of summary jurisdiction, with a requisition that a "summons be issued calling upon the "person to show cause why that "order should not be confirmed, and "upon receipt of such documents and "requisition the court shall issue such "a summons and cause it to be served "upon such person.

"(2) A summons so issued may be "served in England or Ireland in the "same manner as if it had been "originally issued or subsequently "endorsed by a court of summary "jurisdiction having jurisdiction in "the place where the person happens "to be.

"(3) At the hearing it shall be "open to the person on whom the "summons was served to raise any "defence which he might have raised "in the original proceedings had he "been a party thereto, but no other "defence, and the certificate from the "court which made the provisional "order stating the grounds on which "the making of the order might have "been opposed if the person against "whom the order was made had been "a party to the proceedings shall be "conclusive evidence that those "grounds are grounds on which "objection may be taken.

"(4) If at the hearing the person "served with the summons does not "appear or, on appearing, fails to "satisfy the court that the order "ought not to be confirmed, the "court may confirm the order either "without modification or with such "modifications as to the court after "hearing the evidence may seem just.

The appeal was, of course, out of time, and the notice of appeal asked that the time should be extended. But when on April 29, 1955, Mr. Melford Stevenson opened the appeal, it became apparent that, in order to determine the real issue between the parties, it would be necessary to go back much further in point of date. We, therefore, gave leave to appeal out of time against two earlier orders, viz. (i) an order, also made by Mr. Guest at the West London magistrates' court on January 26, and February 23, 1954, upon an earlier application for the enforcement of arrears, and (ii) an order of the domestic proceedings

"(5) If the person against whom "the summons was issued appears at "the hearing and satisfies the court "that for the purpose of any defence "it is necessary to remit the case to "the court which made the provisional "order for the taking of any further "evidence, the court may so remit the "case and adjourn the proceedings for "the purpose.

"(6) Where a provisional order "has been confirmed under this "section, it may be varied or "rescinded in like manner as if it had "originally been made by the con"firming court, and where on an "application for rescission or varia"tion the court is satisfied that it is "necessary to remit the case to the "court which made the order for the "purpose of taking any further "evidence, the court may so remit the "case and adjourn the proceedings "for the purpose.

"(7) Where an order has been so "confirmed, the person bound thereby "shall have the same right of appeal, "if any, against the confirmation of "the order as he would have had "against the making of the order had "the order been an order made by the "court confirming the order."

S. 6: "(1) A court of summary "jurisdiction in which an order has "been registered under this Act or "by which an order has been con"firmed under this Act, and the "officers of such court, shall take all "such steps for enforcing the order "as may be prescribed.

"(2) Every such order shall be "enforceable in like manner as if the "order were for the payment of a "civil debt recoverable summarily:

"Provided that, if the order is of "such a nature that, if made by the "court in which it is so registered, or "by which it is so confirmed, it would "be enforceable in like manner as "an order of affiliation, the order shall "be so enforceable.

"(3) A warrant of distress or com"mitment issued by a court of sum"mary jurisdiction for the purpose of "enforcing any order so registered or "confirmed may be executed in any "part of the United Kingdom in the "same manner as if the warrant had "been originally issued or subse"quently endorsed by a court of sum"mary jurisdiction having jurisdiction "in the place where the warrant is "executed."

court at Chelsea dated November 3, 1953, hereafter referred to as the Chelsea court and the Chelsea order, which revoked or purported to revoke the Gibraltar order, registered as aforesaid.

Mr. Scott Henderson, for the respondent husband, thereupon asked for leave to appeal out of time against an order said to have been made by Mr. Pratt, also at the West London court, on July 20, 1953, whereby the hearing of the husband's application for the revocation of the Gibraltar order was transferred from the West London magistrates' court to the Chelsea court. We were not at the time entirely satisfied that any such order had in fact been made, but indicated that, if it could be shown that such an order had been made, we should be prepared to extend the time for appealing against it.

The hearing of the appeal was then adjourned in order to allow the parties to prepare the further or amended notices of appeal and to take such other steps as might be necessary.

It is plain from what we have already said that the facts are complicated, and it is, therefore, necessary to set out in detail the history of the various proceedings which have taken place.

On March 17, 1952, the Gibraltar court adjudged that the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife and child, and ordered him to pay to the wife through the clerk of the court £2 per week for herself and £1 per week for the child.

On March 31, 1952, there were proceedings in the Gibraltar court in respect of a small amount of arrears due under that order, and an earlier interim order. But those proceedings are not, we think, relevant to the present appeals.

It appears that not long after the making of the Gibraltar order the husband returned to England. The wife and child continued to live at La Linea in Spain.

On July 13, 1953, the Gibraltar order was registered at the West London magistrates' court.

On July 20, 1953, the husband applied by complaint to Mr. Pratt at the West London court for the revocation of the Gibraltar order. The statement of the grounds of his application is as follows:—"1. That my wife, Francisca Pilcher, has refused "a bona fide offer of reconciliation. 2. That she resides in Spain "and not in Gibraltar, and the Spanish Government have refused "me a residence permit."

What happened next is somewhat obscure. At the foot of the certified copy of the complaint is a note which was originally in these terms:—" This application is to be heard on Tuesday the 18th day of August, 1953, at the hour of 10 in the forenoon " at 1A, Walton Street, S.W.3." The date has been altered from August 18 to November 3, 1953.

We do not know what was the precise procedure adopted in order to transfer the hearing of this complaint from the West London magistrates' court to 1A, Walton Street, which, of course, is where the Chelsea court sits, or under what authority it was so transferred. It was against this transfer that Mr. Scott Henderson, for the husband, suggested that he might wish to appeal. He contended that the Chelsea court has in any event no jurisdiction to hear such an application—apart altogether from any question of want of service upon the wife or of the construction of the 1920 Act, which, as will appear, are the points raised by Mr. Stevenson for the wife. At the resumed hearing before us it was conceded by Mr. Scott Henderson that in fact Mr. Pratt made no order of transfer or any order from which it would be possible to appeal. The transfer was apparently a mere administrative act. Nevertheless, he still strenuously contended that the hearing of an application to discharge or revoke a registered order is not one of the matters cognizable by the Chelsea court as constituted by the Metropolitan Police Courts (Domestic Proceedings) Order, 1952 (S.I. 1952, No. 1860).

However, the husband's complaint did apparently come before the Chelsea court, presided over by Mr. Milton, on August 18, 1953. On that occasion, according to the note before us, counsel for the husband agreed that there was some doubt as to jurisdiction, though on what ground is not stated. On his application the case was adjourned to September 15, 1953—a date which appears nowhere on the certified copy of the complaint.

On September 15, 1953, the case came on again before the Chelsea court, Mr. Milton again presiding. The note of what took place is in these terms:—

" Counsel for applicant. Summons has not been served. " ? [sic] jurisdiction in any event. *Not served.*" The last two words are underlined.

Before the final hearing by the Chelsea court both the wife and her Gibraltar lawyer had received from the husband's solicitors notice of the proceedings and of the date of the hearing by letters contained in the agreed bundle of documents, and a copy of the summons was also sent to the Gibraltar lawyer. But there was in the strict sense no service of the summons upon the wife, since there is no means whereby service of summary proceedings can be effected out of the jurisdiction—see Magistrates' Courts Rules, 1952, r. 76 (5).

On November 3, 1953, the husband's application to revoke the Gibraltar order was heard by the Chelsea court, presided over by Sir Laurence Dunne. The husband gave evidence and produced copies of two letters which he said that he had written to the wife on July 21, 1952, and January 13, 1953, respectively. It does not on the face of the note appear that any mention was made of either of two letters, dated respectively September 2, 1953, and October 30, 1953, written by the wife's Gibraltar lawyer to the husband's solicitors in London. Those letters made it plain that it was being contended on behalf of the wife (a) that the English court had no power to revoke the Gibraltar order, and (b) that in any event the husband had not made any genuine offer to resume cohabitation but had decamped from Gibraltar in order to evade paying under the order. The husband's solicitors in a letter of November 4, 1953, stated that the letter of October 30, 1953, was brought to the notice of the court; but in a letter dated November 12, 1953, they stated that Sir Laurence Dunne had said that he did not wish to see the letter.

After hearing the case the Chelsea court, as appeared from the certified copy of the register, revoked the Gibraltar order.

The main contention on behalf of the wife upon the present appeal is that the Chelsea court had no jurisdiction so to revoke the order: first, because the summons was never served upon the wife, and, secondly, because, it is argued, unlike an order confirmed under section 4 of the 1920 Act, an order registered under section 1 of that Act cannot be rescinded, revoked or discharged—whichever synonym happens to be used on the particular occasion—by the court in which it is registered. We refer hereafter to a "registered order" or a "confirmed order," as the case may be.

It is plain that within a few days after the Chelsea order was made the chief magistrate had second thoughts about its validity, for on November 9, 1953, he caused a letter to be written to the husband's solicitors and, according to the certified copy of the register, on November 10, 1953, he added an entry to the minute of adjudication of November 3, 1953, in these terms:—"Dealt "with in error. Not served and no jurisdiction." This entry was made, it would appear, on his own initiative and without reassembling the other magistrates who had composed the Chelsea court. The circumstances are fully set out in a statement by the chief magistrate himself, which was in evidence before Mr. Guest on November 30, 1954, and a further statement by him dated May 12, 1955, which was put before us.

There is, in our judgment, no doubt that the action of the chief magistrate in purporting personally to annul a decision and revoke an order which had been arrived at and made by the Chelsea court, of which he was only one member, albeit the chairman, was wholly ineffective. If the Chelsea order was wrong, it could only be corrected by the court itself under its inherent jurisdiction, in an appropriate case, which in our opinion this was not, or by a superior court.

On January 26, 1954, Mr. Guest, sitting at the West London magistrates' court, heard an application by the wife for the enforcement of arrears alleged to be due under the registered order. The arrears said to be due at the date of the complaint, on January 2, 1954, were £218 2s. 10d. On January 26, 1954, the date of the hearing, the arrears were £230 4s. 10d. Both parties were represented by counsel. It is plain from the note of what took place that counsel for the husband was contending that this order had been revoked by the Chelsea order. Counsel for the wife, on the other hand, submitted that by virtue of rule 56 of the Magistrates' Courts Rules, 1952, the court was bound by the certified copy of the chief magistrate's entry of November 10, 1953, and that if Mr. Guest were to hold that this entry was bad he would, in effect, be sitting as a court of appeal from the Chelsea court. Mr. Guest held—rightly, as we have already indicated—that the entry in question was ultra vires and that the decision of the Chelsea court was that recorded in the first entry in the register, viz., that recording the Chelsea order. Whereupon it would appear that counsel on either side agreed the arrears due up to the date of the Chelsea order at the sum of £180. On February 23, 1954, to which date the question of enforcing the agreed arrears was apparently adjourned, Mr. Guest adjourned the summons sine die upon the terms that the husband should pay off the agreed arrears at 65/- per week.

This order is the second of the orders against which the wife is now appealing. Fundamentally, of course, her appeal is still against the Chelsea order. For if that order was validly made, then it is difficult, if not impossible, to see how Mr. Guest could have decided otherwise than he did. If, however, the Chelsea order was bad the complaint in respect of arrears alleged to have accrued after its date, viz., November 3, 1953, would have been at large for consideration by Mr. Guest.

We now come to the last of the proceedings in the magistrates' courts. On October 6, 1954, a complaint was made in the West London magistrates' court by the chief clerk of that court that arrears to the extent of £102 5s. 0d. were due under the Gibraltar order as registered. At the hearing on November 30, 1954, it was stated in evidence that since November 3, 1953, the husband had paid £49 15s. 0d. Those payments had in the clerk's office been dealt with as if the Gibraltar order had continued in full force and effect. Had the payments been credited against the sums payable before the Chelsea order—which, in our view, was clearly the intention of the order made by Mr. Guest on January 26 and February 23, 1954—the arrears alleged to have accrued after the Chelsea order would have been, not £118 5s. 0d. as they were said to be on November 30, 1954, but £168.

Mr. Guest, in effect, adhered to the decision which he had previously reached. He dismissed the application to enforce arrears said to have accrued due after November 3, 1953. The full reasons for his decision are set out in the notes of the hearing as follows:

After a summary of the facts already stated, in which the certified copy of the entry in the register of the Chelsea court is referred to as exhibit 2, and the first statement by Sir Laurence Dunne is referred to as exhibit 3, Mr. Guest continued as follows:—"Counsel for wife (the respondent appeared but "unfortunately was not represented today although he had been "represented when a similar summons to this one was heard "and dismissed by me earlier this year) argued three points upon "which he urged I ought to hold that the order had never been "revoked.

"(1) That as the original summons which led to the hearing at "Chelsea domestic court on November 3, 1953, was never served "the whole proceedings were a nullity and that, therefore, the "order stood unimpaired. It does appear from exhibit 3 that "the original summons was never served but, even so, I am of "opinion that the order of a summary court even if made 'per "'incuriam' and without jurisdiction stands once made until "over-ruled by a superior court.

"(2) That section 1 (1) of the Maintenance Orders (Facilities "for Enforcement) Act, 1920, under which the order was registered gave no power at all to the court in which the order was "registered to vary it. This is clearly a matter of interpretation "of statute, and although I am clear upon the meaning of the

" section my views are quite irrelevant as this is not a court of " appeal from the Chelsea domestic court.

" (3) That under rule 56 of the Magistrates' Courts Rules, " 1952, this court is bound by the entry in the Chelsea domestic " court register. In my view the rule makes the extract evidence " of the proceedings in that court. The only proceedings in that " court of which exhibit 2 is evidence are of the revocation of " the order. It is clear from exhibit 3 and from the further " marking of exhibit 2 on November 10, 1953, that the entry " 'dealt with in error,' etc., was not a proceeding in court. As it " appears to have been put upon the register without hearing the " parties and in their absence, I cannot feel that it concerns a " proceeding in court. In any event the exhibit 2, if I am wrong " and the second entry is a proceeding in court, is evidence of two " contradictory proceedings in court and it cannot be the task of " a court of co-ordinate jurisdiction to choose between them but " must be a matter which can only be dealt with on appeal by a " superior court. For these reasons I feel unhappily bound to " conclude that the order has been and still is revoked and that " I, therefore, have no power to make any order for payment of " arrears which have accrued since that revocation."

In our judgment, the magistrate's reasoning was plainly correct, provided the Chelsea order stood.

Here again, therefore, we come back to the fundamental question in this case. Was the Chelsea order validly made or not?

It would be sufficient for the determination of the present appeals for us to content ourselves with saying that, as the wife was admittedly never served with any summons to appear at the Chelsea court, that court had no jurisdiction to hear the husband's complaint for discharge of the registered order, and, therefore, that the Chelsea order must be set aside. But, in our opinion, it is necessary for us to go further. For Mr. Scott Henderson for the husband, on the one hand, asks us to remit the husband's complaint, not to the Chelsea court, which he contends has no jurisdiction, but to the West London court, for rehearing. Mr. Stevenson, on the other hand, asks us to dismiss the husband's complaint on the ground that there is no power in either court to revoke a registered order. He asks us to remit to the West London court for rehearing the two complaints on the wife's behalf to enforce the arrears, which complaints have hitherto been dealt with upon the basis that the Chelsea order stood. It would plainly be wrong for us to remit the husband's complaint for rehearing if in our judgment that complaint cannot be entertained in either court.

And in that event it would, of course, be pointless to examine the precise limits of the jurisdiction of the Chelsea court.

The question at issue can be seen by setting out in full section 1 (1) of the 1920 Act in relation to the circumstances of this case. Bearing in mind the provisions of section 9 of the Summary Jurisdiction (Married Women) Act, 1895, the definition of " maintenance order " in section 10 of the 1920 Act, and the proviso to section 6 (2) of that Act,[2] section 1 (1) reads as follows:— " Where an order for the maintenance of the wife has been made " against the husband by the Gibraltar court, and a certified copy " of the order has been transmitted by the Governor of Gibraltar " to the Secretary of State, the Secretary of State shall send a " copy of the order to the chief clerk of the West London " Magistrates' Court for registration, and on receipt thereof the " order shall be registered in the manner prescribed by rule, and " shall, from the date of such registration, be of the same force " and effect as if it had been an order originally obtained in the " West London Court; and, subject to the provisions of this Act, " all proceedings may be taken on such order as if it had been " an order originally obtained in the West London Court; and the " West London Court shall have power to enforce the order in " like manner as an affiliation order."

The provisions governing the enforcement of an order enforceable as an affiliation order are contained in section 74 of the Magistrates' Courts Act, 1952, and the Maintenance Orders (Facilities for Enforcement) Rules, 1922, rr. 5 and 6.

It is true that this procedure involves the personal presence of the husband before the court, and that this may, if necessary, be secured by a warrant for his arrest. If, however, the warrant cannot be executed because the husband is no longer in England or Wales, it may be that the words " all proceedings may be " taken on such order " in section 1 (1) would be sufficient to bring into operation the provisions of the Maintenance Orders Act, 1950, if he is in Scotland or Northern Ireland. But if he has departed to some other country the wife would have no remedy, so long as he remains out of the United Kingdom, subject to the possibility of a fresh registration of the order in any part of the Commonwealth where similar legislation is in force.

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[2] Summary Jurisdiction (Married Women) Act, 1895, s. 9: " The payment of any sum of money directed " to be paid by any order under this " Act may be enforced in the same " manner as the payment of money is " enforced under an order of affilia" tion."

Maintenance Order (Facilities for Enforcement) Act, 1920, s. 10: " For " the purposes of this Act, the expres" sion ' maintenance order ' means an " order other than an order of affilia" tion for the periodical payment of " sums of money towards the main" tenance of the wife or other depen" dants of the person against whom " the order is made . . ."

S. 6 (2): See note 1, ante.

It is, however, material to note that the provisions for enforcement in section 6 of the Act of 1920, and the rules to which reference has already been made, apply equally to orders confirmed under the provisions of section 4 of the Act as to orders registered under the provisions of section 1. But when the essential differences in the scope of these two sections are considered as distinct from the provisions for enforcement, we think that considerable light is thrown upon the proper construction of section 1.

Compared with the corresponding provisions of the Maintenance Orders Act, 1950, s. 18, section 1 (1) of the Act of 1920 appears to contain a certain amount of tautology. For example, it is not obvious why, having enacted that the order is of the same force and effect as if it had originally been made in a magistrates' court in England, it was necessary to enact that all proceedings may be taken upon such order as if it had originally been obtained in a magistrates' court in England, nor, having enacted that *all* proceedings may be taken upon it, to enact further that the court shall have power to enforce the order accordingly. Looking at the words of this subsection alone, even reading them in the light of the title of the Act, viz., "An Act "to facilitate the enforcement in England and Ireland of Main-"tenance Orders made in other parts of His Majesty's Dominions "and Protectorates, and vice versa," which, it may be observed, plainly does not comprehend all the provisions of the Act, we are by no means convinced that the words "all proceedings may be "taken on such order as if it had been an order originally obtained "in [a magistrates' court in England]" are necessarily limited to the power to enforce such an order, a power which is specifically mentioned in the words which follow next in the subsection.

By contrast with section 1 (1) of the Act of 1920, section 4 deals with what are called provisional orders obtained by a wife in a part of the Queen's Dominions outside the United Kingdom, between which and this country reciprocity in this respect obtains; and section 3 of the Act applies to the converse position. A provisional order obtained, for example, in Gibraltar, which has no effect unless and until confirmed by a magistrates' court in this country, may be confirmed by such a court. But before it can be confirmed the husband in this country must be served with a summons calling upon him to show cause why it should not be confirmed, and this summons is only served upon him after the depositions and relevant documents in the case have been transmitted to this country from the court outside the United Kingdom.

At the hearing the court may refuse to confirm the order, or may confirm it, either without modification or with such modification as to the court may seem just. Moreover, if the court decides to confirm it, there is a right of appeal to the Divisional Court of this Division, as if the order had been an order made by the confirming court. At one time there was an appeal by way of case stated to the Queen's Bench Division (see *Peagram* v. *Peagram*,[3] in which case[4] Lord Hewart C.J. gave a comprehensive review of the scope of section 4). Now, by R.S.C., Ord. 59, r. 29 (2), appeals against any order or determination by justices in regard to the enforcement of maintenance orders made in this country or maintenance orders confirmed or registered under the Act of 1920, are to be heard by the Divisional Court of this Division.

Finally, subsection (6) of the section enacts that a provisional order confirmed under the section may be varied or rescinded in like manner as if it had originally been made by the confirming court, but provides that where on an application for rescission or variation the court is satisfied that it is necessary to remit the case to the court which made the order for the purpose of taking evidence, the court may so remit the case and adjourn the proceedings for the purpose.

Seeing that the making of a complaint in a magistrates' court and the service of a summons thereon is, under the Magistrates' Courts Act and Rules, 1952, an essential preliminary to an application for a maintenance order, or for any variation thereof, or for its discharge, it is not at first sight apparent how an application against a wife under section 4 (6) to vary or rescind an order can reach a hearing if she remains in the jurisdiction in which she obtained the original order.

In our opinion, however, Parliament must have intended that the interlocutory procedure for remitting cases from one court to the other in connexion with the confirmation of orders and the variation or rescission of confirmed orders, aptly described in the argument as the "shuttlecock procedure," should operate instead of a summons to the respondent to answer, in the confirming court itself, a complaint for the variation or discharge of the order.

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[3] [1926] 2 K.B. 165; 42 T.L.R. 530.

[4] [1926] 2 K.B. 165, 179, 180.

It is worth noticing, in passing, that the corresponding difficulty in connexion with section 22 of the Maintenance Orders Act, 1950, is met by rule 9 of the Maintenance Orders Rules, 1950, which provides that an application to discharge may be made ex parte, whereupon the section itself brings the "shuttle-"cock procedure" into play.

It is well settled that in connexion with the enforcement of an affiliation order or an order enforceable as such, the validity of the order cannot be inquired into (*Rex* v. *Lancashire Justices, Ex parte Tyrer* [5]), but that the power to enforce the order is discretionary (*Grocock* v. *Grocock* [6]). It must also be remembered in connexion with the latter decision that on the hearing of a complaint for, inter alia, the enforcement of such an order the court may now, by virtue of section 76 of the Magistrates' Courts Act, 1952, remit the whole or any part of the sum due thereunder. In these respects a judicial decision is involved in the enforcement of such an order under section 1 (1) of the Act of 1920. But in no other respect is any judicial decision expressly called for under the section. The registration of the order, whatever its consequences may be, appears to be an administrative act initiated by the Secretary of State. The party against whom the order to be registered was made has no right to be heard to show cause against the registration, nor does the fact that on registration the order becomes an order of the magistrates' court give him a right to appeal either from the order itself or from the registration of it. Nor is there any provision in section 1 (1) at any stage of the proceedings for the "shuttlecock procedure" provided in section 4.

It appears to us, therefore, that the marked contrast between the wording, the scope, and the machinery of the two sections, except only with regard to enforcement, almost necessarily suggests that some limit must be put on the apparent generality of the words "all proceedings may be taken on such an order."

As Mr. Stevenson's argument about the construction of the subsection was based upon the assumption that the word "on" in this last phrase presupposes the continuing existence of an order, he was at one time disposed to suggest that the section might give power to the registering court to order the variation as distinct from the discharge or revocation of a registered order. But this distinction does not seem to us to be sound. For any

[5] [1925] 1 K.B. 200; 41 T.L.R. 103.

[6] [1920] 1 K.B. 1; 35 T.L.R. 509.

complaint for variation or discharge is necessarily based on the fact that at the moment of the complaint there is a subsisting order to the variation or discharge of which the court is asked to direct its mind.

We appreciate, however, the force of the argument that absurd results may follow if the proper construction of the section excludes the possibility of a registered order being discharged or even varied by the registering court. For example, the husband may have conclusive evidence that the wife has died; or he may have been able to initiate proceedings for divorce by virtue of the provisions for substituted service prevailing in the High Court and may have obtained a decree on grounds which would impel a magistrates' court to discharge the order if it were in fact an order which had been obtained in that court (see *Bragg* v. *Bragg*[7]; *Mezger* v. *Mezger*[8]; *Prest* v. *Prest*,[9] particularly the complete paragraph at p. 68, the last word of which should be "desertion," not "adultery," see *Wood* v. *Wood*[10]).

If it is thought that this situation calls for a remedy, consideration might be given to the advisability of applying to orders registered under section 1 of the Act of 1920 some procedure similar to the "shuttlecock procedure" which applies to orders confirmed under sections 3 or 4 of the Act, or under section 22 of the Maintenance Orders Act, 1950, to orders registered under that Act, with or without amendment of the rules so as to enable process or notice of process to be served out of England and Wales by registered post: see Magistrates' Courts Rules, r. 76 (5).

Recognizing, as we do, that neither registered nor confirmed orders are free from certain anomalies and difficulties, the essential differences between the scope of the two sections by which they are governed remain. These seem to us to be such that the true conclusion is that section 1 (1) is limited to enforcement and does not permit of complaints for alteration, variation or discharge of orders registered by virtue of that section. In this respect we agree with the opinion expressed by Sir Laurence Dunne in his first memorandum.

This appears to us to obviate the necessity of pursuing the interesting question to which much of the argument was directed, whether, assuming that it is possible for a magistrates' court in this country, and particularly a metropolitan magistrates' court, to discharge an order registered under the section, the Chelsea

[7] [1925] P. 20; 41 T.L.R. 8.

[8] [1937] P. 19; 53 T.L.R. 18; [1936] 3 All E.R. 130.

[9] [1950] P. 63; 65 T.L.R. 729; [1949] 2 All E.R. 790.

[10] [1949] W.N. 59.

court is a magistrates' court for this purpose, notwithstanding the provisions of section 9 (3) of the Summary Procedure (Domestic Proceedings) Act, 1937, now replaced by section 119 (4) of the Magistrates' Courts Act, 1952, and the Metropolitan Police Courts (Domestic Proceedings) Order, 1952 (S.I. 1952, No. 1860), made under the former Act.

In the result, therefore, the three appeals by the wife will be allowed; that is to say, the appeal against the Chelsea order, the appeal against Mr. Guest's first order of January 26 and February 23, 1954, and the appeal against Mr. Guest's order of November 30, 1954; and the orders made on those summonses are set aside. With regard to the last-mentioned appeal, we give leave for that appeal to be heard out of time. The husband's complaint, which was heard by the Chelsea court, will be dismissed. The two complaints by or on behalf of the wife for the enforcement of arrears will be remitted to the West London magistrates' court for rehearing.

We wish, however, to make it plain that we do not seek to give any indication of the course that should be taken on the rehearing of those complaints. It will be a matter entirely for the magistrate's discretion in the light of the evidence before him whether to enforce or to remit as he thinks proper the whole or any part of the sum due under the registered order.

Appeals allowed.
Leave to appeal.

Solicitors: *Alan, Edmunds & Phillips; Rodgers, Gilbert & Horsley.*

E. J.

ISAAC *v.* ISAAC.

1955
July 4.

Collingwood J.

Legal Aid — Costs — Taxation — Barrister — Brief fee in undefended divorce suit—Case heard out of London—Appropriate fee—Counsel engaged in more than one case on same day—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *3rd Sch.*
Barrister—Fees.

On a taxation of the costs of an undefended divorce suit heard at Bournemouth, in which the petitioner was an assisted person, the district registrar taxed off the sum of £2 2s. from counsel's fee on brief of £7 7s. Objection was taken to this reduction on the

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ground that the usual brief fee when counsel had to appear out of London was £7 7s. The registrar stated in answer to the objection that, while he allowed that fee if counsel were engaged in one case only, in the present instance counsel had appeared in two cases on the same day:—

Held, that in determining the amount by reference to counsel's other professional engagements on the day of the hearing the registrar had taken into consideration a matter which was not relevant to the question before him, and the sum of £2 2s. should accordingly be restored.

Self v. *Self* [1954] P. 480; [1954] 2 All E.R. 550 applied.

Summons for review of a taxation (adjourned into court for judgment).

A husband, who on November 3, 1954, had presented a petition for divorce on the ground of desertion, was granted a civil aid certificate on November 26, 1954. The suit was undefended, and on January 17, 1955, a decree nisi was granted by a special commissioner sitting at Bournemouth. The decree included an order that the costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of the Third Schedule of the Legal Aid and Advice Act, 1949.

On March 30, 1955, the petitioner's bill of costs was taxed by the district registrar, who reduced the fee on brief and clerk's fee from £7 12s. to £5 10s. Objection to the reduction was lodged on behalf of the petitioner upon the ground that the usual fee when counsel had to appear out of London was £7 7s.; and reference was made to Sachs J.'s judgment in *Self* v. *Self*.[1]

The answer of the registrar to those objections was: "If "counsel is engaged *in one case only* I allow a brief fee of £7 7s. "in an undefended suit. In *this* case counsel was engaged in "*two* cases on the *same day*."

No question arose as to the allowance of conference and clerk's fees.

R. J. A. Temple Q.C. and *Trevor Guest* (who did not represent the petitioner at the hearing) for the petitioner.

Argument was in chambers.

Cur. adv. vult.

Collingwood J. read a judgment in which he stated the facts substantially as set out above, and said that he had been invited to deliver judgment in open court as the issue raised was one of general importance. His Lordship continued: It was submitted by counsel that on reducing the brief fee in the way he did the registrar had misdirected himself, and had erred upon a question of principle. It is well settled that upon a question of quantum the decision of the taxing master is, generally speaking, final: "he is the sole judge of the fact whether the business has been "done, and of the proper charge to be made for it" (*per* Sir John Leach M.R. in *Alsop* v. *Oxford (Lord)* [1]). In *Parkinson* v. *Hanbury*,[2] Turner L.J. pointed out that if the court were called upon to adjudicate upon the amount of fees paid to counsel, and whether these fees were to be 10 guineas, or 15 or 20, the vexation and injury to suitors would be infinite. These matters, said the Lord Justice, had always been left to the discretion of the taxing master, and it was proper that they should still be so. And the rule that, so far as the question of quantum is concerned, the court will not interfere with the taxing master's decision, except when the master has misdirected himself, or proceeded on a wrong principle, was again emphasized by Wynn-Parry J. in *Coon* v. *Diamond Tread Co. (1938) Ld.*[3]

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[1] [1954] P. 480; [1954] 2 All E.R. 550.

In the present case, however, the disallowance of the item in question is not merely a question of quantum; it involves a question of principle. The registrar concedes that the normal fee in an undefended divorce suit, where counsel has to appear out of London, is £7 7s., and justifies the reduction to £5 5s. in this particular case by reason of the fact that counsel had *two cases on the same day*. This gives rise to the question of principle—is that a matter properly to be taken into consideration in determining the amount of the fee?

Mr. Temple, in the course of his argument, pointed out some of the questions which would arise from the application of such a rule. These included: (1) Are the fees in all the cases in which counsel is so engaged to be reduced, or only in the second or subsequent cases which come up for taxation? (2) Is the rule confined to two or more cases in the same court, or does it extend—for example—to another case in the local county court? (3) And is the solicitor who brings in the bill for taxation under a duty to provide a list of counsel's other engagements for the day, in case any of them should be such as to call for the application of the rule? (4) Further, is it to be applied to all cases, irrespective of whether the litigant is legally aided or not, with the result that a guilty respondent or co-respondent would automatically benefit from its application, at the expense of the successful petitioner?

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[1] (1833) 1 My. & K. 564.

[2] (1865) 12 L.T. 624.

[3] [1950] W.N. 343; 66 T.L.R. (Pt. 2) 8; [1950] 2 All E.R. 385.

I have come to the conclusion that, in determining the amount of the fee by reference to counsel's other professional engagements on the day of the hearing, the registrar has taken into consideration a matter which is not relevant to the question before him. Apart from that consideration, the registrar considers £7 7s. to be the proper amount. That being so, in taxing off the £2 2s. for the reason which he assigns, he has, in my opinion, acted upon a wrong principle, and it is necessary, therefore, for me to review the taxation.

In so doing, I restore the sum of £2 2s. which has been disallowed by the registrar, and further direct that the costs of this summons be taxed in accordance with the Third Schedule to the Legal Aid and Advice Act, 1949.

Temple Q.C. My Lord, I think it right to say that in regard to this summons there is no question of any fee for my learned junior or my instructing solicitor or myself, so if your Lordship would merely restore the £2 2s. I think that that is all that I can legitimately ask.

COLLINGWOOD J. Then my reference to taxation is withdrawn.

Solicitors: *Messrs. Gillhams.*

J. B. G.

C. A.

1955
May 18, 19.

Evershed M.R., Hodson and Parker L.JJ.

LAKE *v.* LAKE.

Husband and Wife—Divorce—Practice—Form of judgment—Petition dismissed—Condoned adultery—Whether finding of adultery appealable by successful respondent.

Court of Appeal—Jurisdiction—"Judgment or order"—Meaning—Whether right of appeal against findings not contained in formal order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 27—*R.S.C., Ord.* 58, *r.* 1.

A husband petitioned for divorce on the grounds of his wife's cruelty and adultery. By her answer the wife denied both charges, but pleaded that if, contrary to her contention, she had committed adultery, it had been condoned. By a cross-prayer she sought a decree of judicial separation on the ground of her husband's cruelty. The commissioner dismissed the petition, pronouncing in his formal order that the charges were not sufficiently proved and that the wife had not sufficiently proved the contents of her answer. The wife sought to appeal against a finding which she alleged the commissioner had made, in giving the reasons for his judgment, that she had committed adultery:—

Held, that (1) there was nothing in the order, which was in the usual and correct form, against which an appeal could lie. Even if the wife succeeded in disproving adultery the order would not require amendment. Nor could a retrial lead to a result different from that which was achieved by the order as it stood.

(2) That a judgment or order against which an appeal could be brought pursuant to section 27 of the Judicature Act, 1925, meant the formal judgment or order which was drawn up and disposed of the proceedings and which in appropriate cases the successful party could enforce or execute. The right of appeal did not extend to a finding or statement in the reasons given by the court for the conclusion reached.

Per Evershed M.R. Where it is apparent that a finding of adultery will not lead to any effective result because it has been condoned, it may be wiser for the judge trying the case to refrain from expressing any concluded view on that issue.

APPLICATION for leave to appeal from Commissioner Sir Harry Trusted Q.C.

On November 12, 1948, Douglas J. P. Lake was married to Mercia Boffett Lake. In 1950 the wife obtained a separation order and an order for the maintenance of herself and the one child of the marriage, but in February, 1951, the parties came together again and continued to live together until April, 1951, when they again separated until about December, 1951. On December 17 the wife was delivered of a foetus, proved to be approximately three months old. The husband gave evidence that at the date when his wife must have conceived the child he had had no access to her; but the wife in her evidence said that she had been taken for drives by her husband in a motor-van and that on one or more such occasions sexual intercourse had taken place between them. In January, 1952, the parties lived together again as man and wife. The husband petitioned for dissolution of the marriage on the grounds of adultery and cruelty. The wife in her answer denied both charges, but as regards the charge of adultery she alleged that if, contrary to the contention, there had been adultery on her part, it had been condoned. By a cross-prayer she sought a decree of judicial separation on the ground of her husband's cruelty. On November 29, 1954, Commissioner Sir Harry Trusted Q.C. dismissed the petition, pronouncing, in his formal order, that the petitioner had not sufficiently proved the contents of his petition, and that the wife had not sufficiently proved the contents of her answer. In the course of giving his reasons preceding the order, the commissioner expressed doubt whether the husband had been responsible for the wife's condition which had terminated with the miscarriage in December, 1951. After the commissioner had concluded his reasons there ensued a discussion with counsel in the course of which the commissioner said that he found that the wife had committed adultery.

On May 2, 1955, the wife applied ex parte to the Court of Appeal seeking leave to appeal out of time against the finding that she had committed adultery. The Court of Appeal adjourned the matter so as to give the husband an opportunity to be heard. Neither husband nor wife sought to appeal against any other finding or conclusion of the commissioner.

E. H. Laughton-Scott for the wife. Where, as in the present case, more than one distinct and independent issue is raised in divorce proceedings, it is not an appropriate form of order to state that the petitioner has not sufficiently proved the contents of his petition. In the present case the order should have been qualified by a recital that the petitioner had succeeded on the issue of adultery, but that the adultery had been condoned, for it is clear from the recorded reasons given by the commissioner that he found as a fact that the wife had committed adultery. The wife could then appeal against that finding.

[The court adjourned to discuss the matter with the President of the Probate, Divorce and Admiralty Division, and on resumption Evershed M.R. stated that the form of order was that normally adopted and was regarded as being correct in cases where the petitioner had failed to prove the contents of his petition and that it reflected the language of the statute.]

Even if the order is not amended the wife can appeal, for pursuant to section 27 of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] an appeal can be brought against any part of the judgment or order. "Judgment" is capable of three meanings: (a) the formal document expressing the court's decision; (b) a wider meaning of the words uttered by a judge after the evidence in a case has been closed; and (c) the wider everyday meaning of the decision or opinion on a particular matter. In section 27 "judgment" is distinguished from "order" and is used in sense (b). Stroud's Judicial Dictionary, vol. II, p. 1027, gives a similar meaning, which is wide enough to cover a judgment whether or not it is embodied in the final order: see *Ex parte Chinery*[2] and *Onslow* v. *Inland Revenue Commissioners.*[3] The "judgment" for the purposes of the present appeal is the statement of reasons given by the commissioner at the end of the trial, not the formal document drawn up afterwards.

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[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 27: "(1) Subject as otherwise provided in "this Act and to rules of court, the "Court of Appeal shall have jurisdic- "tion to hear and determine appeals "from any judgment or order of the "High Court, and for all the purposes "of and incidental to the hearing and "determination of any appeal, and "the amendment, execution and en- "forcement of any judgment or order "made thereon, the Court of Appeal "shall have all the power, authority "and jurisdiction of the High Court."

This is not a merely academic question: see *Tindall* v. *Wright,*[4] *Sun Life Assurance Co. of Canada* v. *Jervis*[5] and *Sutch* v. *Burns.*[6] Before the divorce proceedings were begun the wife had brought proceedings for maintenance, and this finding may now be used against her as a reason why maintenance should not be granted. Further, if a petition should at some future date be presented on the same adultery revived, the petitioner may invoke the slip rule and then claim that the wife is estopped from denying the charge: see Willmer J. in *Bright* v. *Bright,*[7] quoting *Hoystead* v. *Commissioner of Taxation.*[8]

Where a matter is litigated between parties and a decision is made, whether or not that decision is contained in the order, it will create an estoppel.

[EVERSHED M.R. But does that apply in divorce proceedings?]

In *Robinson* v. *Robinson*[9] Henn Collins J. said that that would not be so with a matter not fundamental to the decree, but this was a fundamental issue in the case and there is a distinct finding against the wife. [Reference was also made to *Henderson* v. *Henderson.*[10]]

Thomas Dewar, for the husband, was not required to argue on the question whether the "judgment or order" against which an appeal can be brought includes the statement of reasons given by the judge.

When a successful litigant puts forward an alternative defence which meets with success, he or she must accept such estoppels as may arise from that defence. If a spouse puts forward a defence of condonation, there is implicit in it a finding of adultery, and the party relying on that finding will be estopped from denying it. A similar result may follow from a plea that the occasion on which a malicious slander was uttered was privileged.

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[2] (1884) 53 L.J.Ch. 662.

[3] (1890) 25 Q.B.D. 465; 6 T.L.R. 454.

[4] [1922] W.N. 124.

[5] [1944] A.C. 111; 60 T.L.R. 315; [1944] 1 All E.R. 469.

[6] [1944] K.B. 406; 60 T.L.R. 316; [1944] 1 All E.R. 520n.

[7] [1954] P. 270; [1953] 2 All E.R. 939.

[8] [1926] A.C. 155; 42 T.L.R. 207.

[9] [1943] P. 43, 44; 59 T.L.R. 170; [1943] 1 All E.R. 251.

[10] (1843) 3 Hare 100.

[EVERSHED M.R. But in that type of case there would be an end of the matter. The difficulty here is that the adultery may be revived and provide a basis for a future decree against the wife.]

Even if the finding of adultery had been recited in the order, it would not be open to review by the Court of Appeal because the wife succeeded on the other defence.

[He was stopped.]

EVERSHED M.R. stated the facts, and continued: In the judgment or order drawn up—and I am not, by using those terms, pre-judging an argument that Mr. Laughton-Scott has put forward; I mean the formal judgment drawn up—after referring to the fact that leave had been given to amend, that oral evidence had been taken of the parties and witnesses on their behalf, and that counsel had been heard on each side, the commissioner pronounced that the wife "had not sufficiently proved the "contents of the answer, that the petitioner [husband] had not "sufficiently proved the contents of the petition," and he dismissed the petition and ordered that the costs be taxed as provided under the Legal Aid and Advice Act, 1949. That form of order, and particularly the formula "the petitioner "had not sufficiently proved . . . ," reflects the language of section 4 of the Matrimonial Causes Act, 1950.[1] On the face of the order, it appears to indicate that the husband generally had failed to satisfy the court of the truth of the charges that he had brought. Mr. Laughton-Scott has complained that that form of order really is imperfect, because it disguises the circumstance (which is apparent, as he says, when one looks at the reasons which the commissioner gave) that, to the limited extent that adultery was charged, the husband succeeded. What he failed to do was to establish that adultery as a ground for divorce, because the alternative defence of condonation was established. Mr. Laughton-Scott, therefore, suggested that the order could, and should, be amended as containing a slip. That argument I reject without any hesitation. This form of order, to my mind, does correctly reflect the conclusion at which the commissioner arrived, namely, that the husband and the wife had each failed sufficiently to prove their cases and so failed to obtain the relief which they respectively sought.

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[1] Matrimonial Causes Act, 1950, s. 4: "(1) On a petition for divorce "it shall be the duty of the court to "inquire, so far as it reasonably can, "into the facts alleged and whether "there has been any . . . condonation "on the part of the petitioner. . . . "(2) If the court is satisfied on the "evidence that—. . . (b) where the "ground of the petition is adultery, "the petitioner has not . . . condoned, "the adultery . . . the court shall pro-"nounce a decree of divorce, but if the "court is not satisfied . . . it shall "dismiss the petition."

The next point made by Mr. Laughton-Scott, and the most formidable one, was that, although the order, on the face of it, did not appear to do other than to negative the charges which the husband had made, when one looked at the pleadings, and more particularly at the recorded reasons given by the commissioner, it became plain that there was a finding of fact, namely, that the wife had committed adultery, and that unless she could in some way challenge that finding in this court, she was in the unhappy position of having such a conclusion unappealable on her part and possibly leading to her disadvantage hereafter, either on some subsequent petition because the alleged adultery had been revived, or perhaps in some proceedings for maintenance which she might bring against her husband.

[His Lordship referred to the facts relating to the alleged adultery, and continued:] The following is the relevant part of the judgment, which contains the commissioner's reasons: "The "landlady of the place where she (the wife) was living said that "there was some discussion between the petitioner and the "respondent afterwards, in which it was not altogether clear "that the petitioner knew of his wife's condition. So on the "whole, although it is a difficult matter about which to make up "one's mind, I do not think that the petitioner was responsible "for the state of affairs which resulted in this miscarriage . . . "I do not know exactly the facts which led to that"; that was an alleged scene of violence. "It was never fully gone into, but "proceedings took place between September and December 17, "when she had the miscarriage. As I say, I am not satisfied "that the petitioner was responsible for that condition . . . Be "that as it may, the parties came together in the following "January, and lived together again as man and wife. So that "anything which may have occurred before then, whether or not "it caused this miscarriage, it was undoubtedly condoned by both "parties." Then he passed on to see what had happened thereafter which related to the allegations of cruelty.

If the matter had rested there, it might well be said that there was no concluded expression of opinion on this issue of adultery; but at the end of the judgment there followed, as there commonly does, a discussion with counsel, and Mr. Dewar, for the husband, at the end of the recorded transcript, said: "It may be clear "from your Lordship's judgment that you find adultery in case "it is revived hereafter. (The commissioner): Yes, I think so. "(Mr. Dewar)"—sticking to the point—"There may be a "possibility of revival hereafter. (The commissioner): Yes." Now, for reasons which I will later state, I think (being wise after the event) it is perhaps a pity that Mr. Dewar sought to rub his triumph home in that way. At any rate, the consequence to him is that he is now here in the Court of Appeal. But, in face of those last two questions and answers, there is obviously a formidable case for saying that this commissioner did find, and intended to find, that adultery had been committed by the wife. It is for that reason, as I have said, that Mr. Laughton-Scott feels a certain anxiety as to the consequences that may flow therefrom for his client in the future.

The next question that we must decide is whether, in the circumstances as I have stated them, there is, properly speaking, any subject-matter upon which we could properly entertain an appeal. I have come to the conclusion that there is not. It is quite clear from the form of order or judgment which I have read that it records accurately the conclusions which, in the end of all, the commissioner reached. Upon the question whether its form is satisfactory, we took the opportunity of consulting with Lord Merriman P., and he has been kind enough to supplement what he told us by also bringing the matter, as I understand, to the attention of his brother judges. There seems to be no doubt whatever that this form of judgment or order, where the petitioner finally fails (although he may have based himself on a number of charges, in respect of some of which he may have succeeded in proving some of the alleged facts) is hallowed by very long usage. It certainly has been consistently used for 20 years, and I should think very probably longer. I think also, that to suggest (except, at any rate, in wholly exceptional circumstances) that an order of this kind should condescend to a detailed statement of every issue which was raised in the case and of the court's conclusions upon those issues seriatim would be to make the form of order altogether too complicated, and, indeed, that it would be an impracticable and wholly undesirable result.

Therefore, I start by assuming and accepting that this is an appropriate and correct form of order. From that it seems to me to follow inevitably that we could not now entertain an appeal upon the matter of fact, Aye or No, was the wife guilty of adultery? for the short and simple reason that, even if we came to the conclusion that the commissioner formed a wrong view on the facts, we could not make any alteration in the form of the order under appeal. It would still stand correctly recording the result of the proceedings, exactly as it stands now. I go further. Let it be supposed that Mr. Laughton-Scott were free to raise this matter in the court, and that the court came to the conclusion—as sometimes does happen—that the manner of the trial of this issue was not satisfactory—I am not, of course, suggesting we should in this case, because we have not gone into it—the right course for the court to take, presumably, would then be to order a new trial. A new trial of what? That again, as I think, shows the impossibility of our acceding to Mr. Laughton-Scott's request, for I cannot see how we could possibly order the issue of adultery as such to be retried, seeing that a retrial could not possibly lead, in the circumstances, to any effective result whatever.

There remains this further point: a party's statutory right of appeal is now regulated by the terms of R.S.C., Ord. 58, r. 1, which states that the appellant may—pursuant to section 27 of the Judicature Act, 1925—appeal from "the whole or any part "of any judgment or order." Mr. Laughton-Scott strongly argued that the judgment, for the purposes of the present matter, is not the formal document which I have already read, drawn up and signed by the district registrar, but is the statement of the reasons given by the commissioner at the end of the trial, and from the transcript of which I have read certain short extracts. I will assume that the statement should be construed and read in the light of the questions and answers, which I also read, following the delivery of the so-called judgment, though I must not be taken to be saying that such a dialogue should necessarily be treated as part of the judgment itself. But, in my view, the argument cannot be sustained. Nothing which Mr. Laughton-Scott brought to our attention from the cases which he mentioned persuades me that by the words "judgment or order" in the rule, or where they occur in the Judicature Act, 1925, is meant anything other than the formal judgment or order which is drawn up and disposes of the proceedings, and which, in appropriate cases, the successful party is entitled to enforce or execute. In other words, I think there is no warrant for the view that there has by statute been conferred any right upon an unsuccessful party, even if this wife can be so described, to appeal from some finding or statement—I suppose it would include some expression of view about the law—which may be found in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding.

If that is right, I come back again to the formal judgment or order; and, for the reasons which I have already made plain, there is no part of that document against which any appeal or, indeed, any complaint, could be made on the part of the wife. As Mr. Dewar observed, she raised as a substantive defence that if she had committed adultery (though she denied it) then that adultery had been condoned, and in that matter she was successful. Indeed, upon her husband's petition she was the successful party at the trial. And it may be said in mitigation of her apparent present embarrassment due to the finding of adultery, that, after all, she succeeded in one of the defences which she deliberately put forward, and it ill becomes her now to complain of that fact in this or in any other court.

There remains, however, this question: as I have said, the wife's anxiety is lest the finding, which I will assume (though I do not so decide) that the commissioner made and intended to make about the adultery, should be used against her in subsequent matrimonial proceedings. Of course, in perhaps 99 cases out of 100, the present problem is not likely to arise, because one party or the other, or both, will appeal against the whole of the trial judge's conclusion, and the whole matter will then be open for rehearing. This is the hundredth case, and I assume that the facts as to the relevant matter of condonation are too clear to be challenged. I think that, in a case of this kind, where it is apparent that a finding of adultery will not lead to any effective result because any adultery has been quite plainly and incontrovertibly condoned, it may well be the wiser course for the judge trying such case to refrain from expressing any concluded view on the issue of adultery, because that view would be in effect unappealable and because of its possible consequences. He may well think it proper to express his inclination to prefer one witness rather than another, but he may, as I think (without seeking to lay down any hard-and-fast rule) think it a wiser course in such circumstances as have arisen here, even when provoked by questions put to him by the counsel for one or other of the parties, to refrain from expressing a final view on the matter of adultery, for the reasons which I have indicated. After all, adultery is, whatever the later consequences may be, a very serious thing.

But there still remains the question: what is the effect for the future of this finding? It was suggested by Mr. Laughton-Scott that if hereafter a petition was presented, founded on the same adultery revived, or if in proceedings which the wife took for maintenance this question was raised against her by the husband, she might find herself in the position that the other party claimed that the adultery was now res judicata and that she was, therefore, estopped from denying the charge. I do not think it necessary or desirable that I should express any final view whether such a plea of res judicata would be successful, if raised, in all or any of the possible proceedings that might ultimately be brought. A plea of res judicata may depend for its success upon particular circumstances in particular cases. I will, however, say that if the view recently expressed by Willmer J. in *Bright* v. *Bright*,[2] to which Mr. Laughton-Scott referred us, is correct, it supports the view that the wife would not be estopped from defending herself if this alleged adultery was charged against her again. I do not think it would be right in this matter, which is one of an application for leave to appeal, for the court to say any more; but that authority lends support, if it be well founded, for the view that the wife would not be so embarrassed hereafter as she has perhaps, not unnaturally, in view of the dialogue to which I have already referred, been led to fear.

For the reasons which I have stated I come to the conclusion that this appeal ought not to proceed. I think that, although an order was made giving leave to appeal, it was in effect adjourned in order that this matter might be debated, but I think that it would not be right for this court now to entertain the appeal which the wife has sought to bring before the court.

HODSON L.J. I agree. This is an attempt by a successful party to appeal against an order which she has obtained in her favour. In my judgment, this court cannot entertain such an appeal. The proceedings were proceedings for divorce, in which each side accused the other of cruelty. The husband, who was the petitioner, not only alleged cruelty, but also alleged adultery; and the form of the order which was drawn up after the commissioner had given his judgment, recited that the evidence had been given and counsel had been heard and pronounced "that "the respondent had not sufficiently proved the contents of the

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[2] [1954] P. 270; [1953] 2 All E.R. 939.

"answer" (that is, the answer alleging cruelty), "that the "petitioner had not sufficiently proved the contents of the "petition" (that was a petition alleging cruelty and adultery), dismissed the petition and then dealt with the costs.

The wife's complaint is that, notwithstanding her success in the action, the commissioner, in giving his oral judgment before the order was drawn up, said that he disbelieved her when she denied the charge of adultery which was made against her by her husband, and found that she had committed adultery, although he had condoned it. In the pleadings she had not only denied the adultery, but she had said as an alternative defence, as she was quite entitled to do, that if adultery was committed it was condoned; and, on the alternative defence, she succeeded. The position, therefore, is that, although she failed in part of her defence to the charge of adultery, she succeeded in the other part; and the result was, in my view, correctly contained in the order to which I have referred. That order is in the form which has been used for many years, probably longer than the 20 years over which it has been possible to trace an order in that form. In effect, it follows, but in converse form, the form of order which is made in making a decree. When a decree is pronounced, the court declares that the petitioner has sufficiently proved the contents of the petition, and when a decree is refused, as here, that the petitioner or respondent (as the case may be) has not sufficiently proved the contents of the petition or the answer.

If that order is correct, there is nothing on the order against which the wife can appeal. Appeals under section 27 of the Judicature Act, 1925, lie against judgments or orders of the High Court, and there is no doubt that that section is dealing with the formal judgment or order. The distinction between "judgment" and "order" has been dealt with in this court by Lord Esher M.R. in *Onslow* v. *Inland Revenue Commissioners*.[3] I need read only one sentence: "A 'judgment' is a decision "obtained in an action, and every other decision is an order." That is drawing a distinction between judgments obtained in an action and other orders, but it is only dealing with the formal order and not with the reasons for the decision, which may, in many cases (especially where, as here, alternative defences are put forward), lead to a successful defendant finding himself or herself in the position of having won a case, and having had matters decided against him or against her about which some feeling of dissatisfaction may remain. Nevertheless, it does not follow that because the judge, in arriving at his conclusion, has determined those matters in that way, there is an appealable issue. That, I think, is this case. There was no slip in the order, and there is no appeal against the reasons given by the judge before making the order.

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[3] (1890) 25 Q.B.D. 465; 6 T.L.R. 454.

The anxiety felt by the wife was due to the fact, I suppose, that this was a divorce case, and the effect of her having been told by a judge in litigation between herself and her husband that she was guilty of adultery might, she feared, be used against her if there was any subsequent litigation between the same parties. The way in which that statement by the commissioner might be used against her has not been examined by this court, and it would not be right, where the issue does not arise, for this court to give its view whether or not there could possibly be any application of the res judicata doctrine. This matter has been considered by Willmer J. in *Bright* v. *Bright*.[4] He referred [5] to a decision of Lord Merriman P. in *Hudson* v. *Hudson*,[6] the headnote of which reads [7]: "In support of a petition for divorce "based upon the same facts, it is not sufficient merely to rely "upon a previous conviction of a particular offence in a court "of summary jurisdiction even though that conviction may have "been upheld on an appeal to the Divisional Court. In the "Divorce Court the matter is not concluded per rem judicatam; "and no doctrine of estoppel can operate against a party so as to "abrogate the statutory duty of the court to inquire into the truth "of a petition which is properly before it." That is a reference to what is now section 4 of the Matrimonial Causes Act, 1950, which imposes the duty on the court to inquire into the truth of matters before it, and, prima facie, is not affected by the doctrine of estoppel per rem judicatam.

PARKER L.J. I entirely agree with both judgments which my Lords have delivered, and there is nothing which I can usefully add.

Application dismissed.

Solicitors: *Smith & Hudson for Harold Michelmore & Co., Newton Abbot; Keene, Marsland & Co. for McLusky & Braddell, Exeter.*

E. D.

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[4] [1954] P. 270.
[5] Ibid. 270, 283.
[6] [1948] P. 292; 64 T.L.R. 258; [1948] 1 All E.R. 773.
[7] [1948] P. 292.

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